IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA JUNEAU GOLD MINING COMPANY (a corporation), *Appellant*, vs. EBNER GOLD MINING COMPANY (a corporation), THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), ANGUS MACKAY, as receiver for THE ALASKA-EBNER GOLD MINES COMPANY (a corporation), and DOWNIE D. MUIR, *Appellees.*	No. 2795

BRIEF OF APPELLEE, EBNER GOLD MINING COMPANY.

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IN THE

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BRIEF OF APPELLEE, EBNER GOLD MINING COMPANY.

Statement of the Case.

This suit was brought in the District Court of the District of Alaska, at Juneau, by the above named appellant against the above named appellees to enjoin them from the use of certain waters of Gold Creek, a mountainous stream near Juneau, Alaska (Tr. Vol. I, p. 20).

The trial resulted in a decree dismissing the complaint and adjudging that the appellee, Ebner Gold

Mining Company, was entitled to the first and paramount use of the water of Gold Creek, to the extent of 10,000 miners' inches (Tr. Vol. VII, p. 2679). The appeal is from this decree (Tr. Vol. VII, p. 2740).

It appeared upon the trial, and the court found, that the Ebner Gold Mining Company, one of the above mentioned appellees, is the real party in interest, and we will, throughout this brief, refer to that company as the appellee.

THE FACTS.

The record in this case is very long; it consists of 2746 pages, contained in seven volumes. From the very nature of the appeal a discussion of the evidence by the appellee is necessary. To a considerable extent the same is conflicting and, as we will hereafter point out, the cause being one of equitable cognizance, the findings of the trial judge, unless founded in obvious error, will, therefore, not be disturbed.

A large part of our discussion of the evidence concerns the property of the appellee, and in the course of this discussion we make frequent reference to a map filed by the appellee upon the trial of the cause and known as defendant's exhibit "S". This map was also used by Mr. Winn at the oral argument in this court. A reduced photographic copy of it is in Volume VI of the record, at page 2167. We have, however, for the convenience of the court in following the argument, caused a number of extra copies of it to be made and have filed the same with this brief.

In presenting the case on behalf of the appellee we have divided the entire subject matter into a number of separate parts, as shown in the table of contents at the beginning of this brief. Under each part we have tried to group the facts material to the particular questions therein under consideration. This, we believe, not only makes for a clearer presentation of the case on behalf of the appellee, but will also, by enabling the court to omit from consideration such matters as it does not deem necessary to be considered, lighten the labors of the court in the determination of this appeal.

The facts in the case are clearly and concisely stated in the findings of the trial court. As these findings are presented in the record, however, it is somewhat difficult to follow them, inasmuch as the exceptions and objections of the appellant to each finding are made a part of the same (Tr. Vol. VII, pages 2642 to 2676). We have, therefore, had a copy of the findings made, without the objections and exceptions of the appellant, and have attached the same to this brief as an appendix.

The material facts necessary for a consideration of the questions involved may, we think, be concisely stated as follows:

For a long time prior to the commencement of this action, and at the time of the trial thereof, the appellee was the owner of a large number of contiguous quartz mining claims and mill sites in Silver Bow Basin, near Juneau, Alaska. These mining claims carry gold of great value, in the form of low grade milling ore. The upper end of the claims lies in the mountains and the

mill sites are in the valley below. Gold Creek flows over and across this group of claims; it commences at the upper end thereof, and then, in its course, winds its way down through the mill sites (Finding 1, Tr. Vol. VII, p. 2642).

The appellee claims the right to use 10,000 miners' inches of water from Gold Creek, by reason of prior appropriation and use thereof. This claim is based, among other things, upon a notice of appropriation, or location of water, posted on June 20, 1910, by one H. T. Tripp, on what is known as the Ebner dam on the Golden Fleece, one of the patented claims of appellee, and in October thereafter recorded with the recorder of Juneau, and also upon another notice, posted on the same dam, but on the opposite side of the creek from that on which Tripp's notice was posted, by John R. Winn, as agent and attorney for appellee, on the 17th day of August, 1910, and recorded on the same day; upon the prosecution, with diligence, to completion, of the work commenced by appellee for the diversion of the water, and, finally, upon the application by appellee of the water to actual use for mining purposes on its property. It may here be noted that, after its use by appellee, the water is returned to Gold Creek (see appellee's answer, Tr. Vol. I, p. 27).

At the time that Tripp posted his notice, he was in the employ of one F. L. Underwood. This employment began some time in 1908. Underwood was at that time the owner of nearly all of the capital stock of the appellee. Tripp was employed to go upon the property of the appellee to examine the same, and to ascer-

tain the most practical way of opening up and developing it, and of working and mining it on a larger scale than it had theretofore been worked and mined. Prior to that time, and from 1895 to 1908, one William M. Ebner had mined and milled the ore taken from the property at the upper end of it; part of the time he used a 10-stamp mill and the rest of the time a 15-stamp mill. During all of this time, Ebner was President and General Manager of the appellee, as well as the owner of most of the shares of its capital stock. In 1908 he sold all of his stock to Underwood, and it was then that Underwood employed Tripp.

Tripp proceeded with his work until some time about the 1st of August, 1910. During the latter part of his work, he was in the employ of the California-Nevada Copper Company, which had, in the meantime, become the owner of all of the shares of the capital stock of appellee. Everything that Tripp did was for the appellee and for its benefit. During his employment, Tripp made such examinations and explorations of the property as satisfied him of the plans, according to which the property should thereafter be mined, and these plans were also satisfactory to the appellee. The plans of Tripp were that something like a 200-stamp mill should be built at the lower end of the property near Shady Bend, on what is referred to as Cape Horn No. 2 lode claim, or Cape Horn mill site; that a tunnel should be commenced, near where the mill should be built, and, after crosscutting the formation of appellee's property, should be driven to the old workings at the upper end of the property, where Ebner had been mining. Water,

in addition to that which Ebner had been using, was to be taken from Gold Creek. The old Ebner dam, on the Golden Fleece claim of appellee, where Tripp posted his notice, would be the proper place for the intake of the flume or ditch; thence the water would be conveyed down the southerly bank of Gold Creek, and across the creek to the point where Tripp had concluded to build the mill and to commence the driving of the tunnel.

In July, 1910, one George Bent came to Juneau, representing Underwood and the California-Nevada Copper Company, the name of which was thereafter changed to The Alaska-Ebner Gold Mines Company. Tripp, at that time, had left the service of Underwood and the California-Nevada Copper Company, and Bent, as representative and manager of the California-Nevada Copper Company, and as representative of Underwood—Underwood and the copper company at that time owning all, or about all, of the shares of the capital stock of the appellee—took charge of the work, which had been commenced by Tripp, to carry out the latter's plans for the use of 10,000 miners' inches of the water of Gold Creek.

Bent remained in charge of the work for only a short time. About the time that he took charge, one Mackay was employed by Underwood in New York, representing the appellee, to take charge of the property and to select machinery for a 200-stamp mill, as had been recommended by Tripp. Mackay was instructed by Underwood, after he had selected the machinery, to proceed to Seattle, Washington, and to get out the timbers, lumber and material for the 200-stamp mill.

Mackay arrived in Seattle in July, 1910, and commenced the work of getting out the timbers, lumber and material for the mill. About this time Bent wired Mackay to come to Juneau and Mackay arrived there the latter part of July, 1910.

Prior to Mackay's arrival in Juneau, Bent had employed a firm of surveyors, Hill & Wettrick, to go upon the appellee's property and to establish the grade for a flume line to conduct the water from the Ebner dam, where Tripp had posted his notice, to Shady Bend, where he had planned to build the 200-stamp mill and commence the working tunnel. The water was to be used at that place for all general purposes in mining the property and milling the ore taken therefrom, as well as for generating power for driving the tunnel, and for any other necessary purposes in connection with the opening up and working of the property on a larger scale. The surveyors commenced surveying out a flume line and established a grade on the opposite side of the creek from where Tripp had concluded to take the water; but the water was to be conveyed to the same place to which Tripp had intended to take it. Ebner had decided on this method of carrying the water from the dam around to Shady Bend, before he had sold out to Underwood, and Bent and his party had knowledge of this fact.

On August 17, 1910, the appellee, by its attorney and agent, John R. Winn, posted and recorded a second notice of location and appropriation of the water of Gold Creek. This notice was also posted on the Ebner dam—the same dam on which Tripp had posted his

notice—but on the opposite side of the creek. The water was thereafter diverted by appellee from the point at which this notice was posted.

Mackay, after remaining in Juneau at Bent's request until along about the 8th or 10th of August, 1910, returned to Seattle and continued the preparation of the lumber and materials for the 200-stamp mill to be erected on appellee's property. While Mackay was in Seattle, Bent continued the work, which had been commenced on appellee's property, for opening it up and mining it on a larger scale. Mackay, some time in September, 1910, returned to Juneau, and was employed by Bent, acting for Underwood and the California-Nevada Copper Company, as the holders of practically all of the shares of the capital stock of appellee. Mackay assumed the general superintendency of all the work to be conducted on appellee's property, except the establishing of the grade line for the flume, which was left to the surveyors, Hill & Wettrick. At the time of Mackay's return, work was progressing on the flume line. Hill & Wettrick were clearing the right of way and establishing the grade. Mackay proceeded with the construction of the flume and about October or November, 1910, had it completed. He commenced at the Ebner dam, going down the right bank of Gold Creek to Shady Bend, where the mill was to be constructed, the distance being about 4,000 feet. Some time prior to September 14th, 1910, in addition to the other work, which the parties representing appellee had done, looking towards carrying out the Tripp project, as modified by Mackay, an excavation had been made at the old Ebner dam for a

flume, and an opening made in the flume and a temporary headgate placed therein, and the water diverted through this ditch, all of which was prior in time to any physical demonstration or work by appellant looking towards the appropriation of the water of Gold Creek.

Mackay commenced driving the large working tunnel in December, 1910, and continued the driving thereof and other work upon the property of appellee until 1913. Early in May or June, 1913, he erected a new air compressor, at Shady Bend, on Cape Horn No. 2 claim, where it had been determined by Tripp and those who followed him to build the mill. In August of the same year he applied the water of Gold Creek, which was conducted through the new flume to the new air compressor which had been constructed, and he used the power so generated for extending the tunnel, which, at that time, had been driven over 1,173 feet.

About June, 1913, one Downie D. Muir, who represented the United States Smelting, Refining & Mining Exploration Company, which at that time held an option to purchase all of the shares of the capital stock of the appellee, and which it has since exercised, joined with Mackay and continued the work of carrying out these plans for working the property of appellee on a larger scale. Inasmuch as the company, which Muir represented, had an option on all of the shares of the capital stock of the appellee, all of the work which he did, as well as that which was done by Mackay, was for the appellee and for its benefit. The work was at all times prosecuted with diligence, and was being

prosecuted with diligence at the time of the trial of this case.

It appears from the evidence, and is admitted by the appellant (Brief p. 50), that the rights asserted by it are based upon the so-called "Mulligan notice", which was posted upon the "Lotta" patented claim, which, concededly, was the property of appellee.

Argument.

Seventy-four errors are assigned (Tr. Vol. VII, pp. 2686-2737); appellant has, however, abandoned the first thirty-nine (Brief of Appellant, p. 24).

1. THE EVIDENCE WAS CONFLICTING. THE FINDINGS WILL, THEREFORE, NOT BE DISTURBED UNLESS THERE WAS GROSS ERROR.

A mere glance at the transcript of record shows that a great mass of evidence, documentary and oral, was introduced upon the trial of this case, and to a large extent it was conflicting. Under a well settled rule of appellate practice in equity cases, the findings of the trial court will under these circumstances, therefore, not be disturbed, unless founded upon an entirely mistaken application of the evidence, or based upon a gross misapprehension of the facts.

See,

Tilghman v. Proctor, 125 U. S. 136;
Kimberly v. Arms, 129 U. S. 512;
Turner v. Ferris, 145 U. S. 132;

Silver King Coalition Mines Co. v. Silver King C. M. Co., 204 Fed. 166, 177;

The Prinz Eitel Friedrich, 206 Fed. 898;

Arctic Lumber Co. v. Borden, 211 Fed. 50, 52;

Parker v. Ross, 234 Fed. 289;

Luten v. Sharp, 234 Fed. 880, 881.

The language of the Circuit Court of Appeals for the Second Circuit, in the case of *De Laski, etc., Tire Co., et al., v. United States Tire Co.,* decided May 24, 1916, and reported in Volume 235 Fed., page 290, is peculiarly applicable here. The court there said, at page 292:

> "This, however, is a litigation aptly suggesting the truth that, while an appeal in equity brings up all the facts for review, there must come a time when the suitors' right to new investigations of complicated occurrences is properly limited to the indication of palpable error, and does not extend to discussion of matters about which all experience shows careful men may justly differ."

2. THE CONTENTIONS OF APPELLEE.

It is the contention of appellee that the facts in the case show, *first,* a valid appropriation on its behalf of 10,000 miners' inches of the water of Gold Creek; *second,* the commencement and diligent prosecution of the work for the use of the water and the prior right of appellee to the same, as against the appellant; and, *third,* that appellant has established no right whatsoever to any of the waters of Gold Creek.

3. THE CONTENTIONS OF APPELLANT.

The main points which the appellant urges for a reversal of the decree, as we understand them, are, *first,* that there was no privity between Tripp and the appellee and that, therefore, the appropriation of the water of Gold Creek by Tripp did not inure to the benefit of the appellee; *second,* that the appellee was not the owner of all of the mining ground necessary for the plan and scheme of mining operations for which Tripp had appropriated the water of Gold Creek, and, *third,* that the Tripp notice of appropriation was, in any event, ineffective, because it did not comply with the provisions of the so-called miners' rules and regulations of the Harris Mining District. There are, besides, some minor points, to which we shall advert in the course of our argument.

For the sake of the orderly presentation of the case on behalf of appellee, it will better serve its purpose to first show the mining properties owned by it at the time Tripp posted his notice, then to show that Tripp, in posting his notice, acted for it, and then to consider the validity and sufficiency of the notices of appropriation, and, finally, to show that, irrespective of the rights of appellee to the water, the appellant, which instituted this action, has no standing in court, because the evidence shows that its claim to the water of Gold Creek is based upon a trespass, and that it, consequently, has no valid basis upon which to predicate its suit.

First.

AT THE TIME OF THE POSTING OF THE TRIPP AND WINN NOTICES OF APPROPRIATION, APPELLEE WAS THE OWNER OF THE FOLLOWING PATENTED CLAIMS: LOTTA, TAKU, KEYSTONE, GOLDEN FLEECE, GRAND REVIEW, JEWEL AND CROWN POINT AND OF THE UNPATENTED CLAIMS: PARISH NO. 1, CAPE HORN AND EUREKA; AND OF THE CAPE HORN AND EUREKA MILL SITES, THE CAPE HORN MILL SITE BEING SAME AS CAPE HORN NO. 2 CLAIM.

In an endeavor to show that the Tripp notice did not contemplate the diversion of the waters of Gold Creek to the mill site of the appellee upon which its mill was to be erected, appellant contends that the appellee was not the owner of this mill site. It claims that the Cape Horn lode and the Cape Horn mill site, afterwards known as the Cape Horn No. 2 lode, were located by William M. Ebner for himself and his co-locators, and that he was the owner of the same. The evidence shows, however, that although Ebner individually located these claims, he was president of the appellee at the time of their location, and that he located the same for the appellee and afterwards conveyed them to it. For a more complete understanding of the situation we will briefly call attention to the evidence showing the properties at that time in the ownership of the appellee.

Finding of Fact No. II made by the trial court is unchallenged (Tr. Vol. VII, p. 2642), and the following facts must, therefore, be regarded as established:

> The appellee was for a long time prior to the commencement of this action and at the time of the trial of the same the owner of a large number of contiguous quartz mining claims and mill sites in Silver Bow Basin near Juneau, Alaska. These

> mining claims carried and contained gold in great values in the form of a low grade milling ore. The upper claims lie high up in the mountains and the mill sites in the valley below. Gold Creek flows over and across this group of lode claims, commencing at the upper end thereof, and winding its way down to the mill site of the Ebner Company.

William M. Ebner operated this property, mined and milled the ore taken therefrom, from 1895 to 1907 (Tr. Vol. III, p. 1083). When he began to operate the property, it was composed of the following patented lode claims: Taku, Keystone, Golden Fleece, and Grand Review, Jewel, and Crown Point. They constitute the patented mining claims of the appellee (Tr. Vol. III, p. 1092). But Ebner, while president and general manager, and the owner of the majority of the shares of the capital stock of the appellee, with a view to operating the appellee's property on a larger scale, located other mining claims and mill sites, which he afterwards conveyed to the appellee. Among the mining claims so located were the Parish Nos. 1 and 2, conveyed to the appellee October 24, 1899 (Tr. Vol. VI, pp. 2291, 2293), and the Cape Horn and Eureka (Tr. Vol. III, p. 1093). (It may here be noted, however, that the Parish No. 2 claim was determined in a suit between the parties to this suit, to have been a void location and the land covered thereby to be public land. See 210 Fed. 599.)

Ebner stated, in referring to these locations, that "they were all made with a view of being turned into the Ebner Gold Mining Company" (Tr. Vol. III, p. 1094). Ebner being a majority stockholder in the appellee, and these locations having been made for its

benefit, it is, we believe, not open to dispute that all of them inured to its benefit when they were made, and even before any formal transfer thereof to the appellee. Hereinafter, in subdivision "Fourth" of this brief, we have cited some of the authorities to which we ask the court's attention in support of this proposition.

Among the mill sites which Ebner located for the appellee, and under the same circumstances under which he located the above lode claims, was the Cape Horn mill site (Tr. Vol. III, p. 1094). (This mill site is known also as Cape Horn No. 2 lode claim, and covers the same surface ground as the Cape Horn No. 2.) Concerning this mill site, Ebner testified as follows:

> "At the time I located that"—referring to the mill site—"for myself, but with the intent—my principal purpose was to use it in the near future for the Ebner Gold Mining Company (appellee) as a mill site" (Tr. Vol. III, p. 1095).

He further said in substance that:

> The Cape Horn mill site covered practically the same ground as was thereafter embraced within what is known as the Cape Horn No. 2 lode claim, as indicated on appellees' exhibit "S" (Tr. Vol. III, p. 1095).

When Ebner first commenced mining this property, he used a 10-stamp mill, and this he later increased to a 15-stamp mill. This mill was located on the patented Taku claim (Tr. Vol. III, p. 1083; exhibit "S"). The water used to generate the power for running the mill and milling the ore was taken out of Gold Creek at the Ebner dam, built on the Golden Fleece lode claim of appellee. For some time the water was applied for

generating the power for running the mill, and for milling purposes, and was taken out of the flume at a pen-stock on the hillside, immediately above the mill on the Lotta claim.

Subsequently, Ebner discovered that he did not have sufficient head of water at the mill and he concluded to go down the creek in the canyon and to erect on the patented Lotta claim another building for an air compressor and stamp mill (sometimes referred to by appellant as the "New Mill"); but, Ebner installed no machinery in this building, except an air compressor and electric light plant, which he used in connection with the 15-stamp mill.

Ebner stated with reference to this matter, substantially:

> That this air compressor down in the canyon was built in 1897, and I intended to put in a 40-stamp mill there and an air compressor for the purpose of getting power at the old mill; that I could not get power enough with a 110-foot head, which I had in applying the water to the old mill, and couldn't operate the compressor or the 15-stamp mill or even the 10-stamp mill when the water got low in Gold Creek.

He expected that when he had installed his 40 stamps in this mill he would bring his pipe line over to Shady Bend, on the Cape Horn claim, and start a working tunnel on practically the same lines as the one now there (Tr. Vol. III, p. 1096).

Some time in the year of 1906, Ebner employed a surveyor by the name of Hill, and had a survey made for a tunnel site, and, he stated, that while it might not be

precisely on the same line on which the tunnel was afterwards run by Mackay, still the opening was on the same spot. Ebner planned to take the water to Shady Bend, on the Cape Horn mill site, or Cape Horn No. 2 claim, through a pipe line running through the tunnel which he intended to drive (Tr. Vol. III, pp. 1098-9). And, in this connection, he stated that his intentions were the same as those of the appellee, inasmuch as he held the control of the capital stock of the appellee and conducted its affairs and was, in effect, the appellee itself.

In 1900, Ebner abandoned the idea of building a mill where he had installed the new air compressor, on the Lotta claim in the canyon, and fully adopted the plan of opening up and working the property on a larger scale, by building a mill at Shady Bend on the Cape Horn mill site, afterwards known as Cape Horn No. 2, at the same point where Mackay graded off and excavated for a mill (Tr. Vol. III, pp. 1111-12).

Respecting the Cape Horn and Eureka lode claims, Ebner at first had some partners in these two locations (Tr. Vol. III, p. 1116), but he afterwards purchased their interests (Tr. Vol. III, p. 1126). The conveyances from Ebner's co-owners to him and from him to the appellee are set forth in the record (Tr. Vol. VI, pp. 2225, 2234, 2237).

In 1908, Ebner sold out his interest in the appellee to F. L. Underwood (Tr. Vol. III, pp. 1086-87-88).

Ebner further stated, in regard to the Cape Horn and Eureka lode claims, that "when I sold my stock in Ebner Gold Mining Company to Underwood, I conveyed the

Cape Horn and Eureka lode claims by deed to F. L. Underwood; that these claims were especially reserved for appellee". And in this connection, he testified further (Tr. Vol. III, p. 1126):

> "The Cape Horn No. 2 (meaning the lode claim) was originally located as a mill site. In 1908, I had sold my stock in the Ebner Gold Mining Company and deeded the Cape Horn and Eureka (meaning the lode claims) and the Cape Horn and Eureka mill sites to F. L. Underwood. After surveying the Cape Horn lode I found outside of the Cape Horn lode property was a ledge, and I didn't know it was outside of the Cape Horn; therefore I located the Cape Horn No. 2 as a lode claim and located it in my own name, all the time expecting to have it conveyed to Mr. Underwood or whoever the proper parties might be who were in possession of the Ebner Gold Mining Company" (Tr. Vol. III, p. 1126).

Tripp was present when the location of the Cape Horn No. 2 lode claim was made and immediately notified Underwood (Tr. Vol. II, p. 524).

Appellant lays some stress upon the point that the Cape Horn No. 2 lode claim, which is the same as the Cape Horn mill site, was conveyed by Ebner to one Martin. Ebner stated in reference to this as follows:

> "When I made the conveyance to Mr. Martin, I had understood that Mr. Underwood was out and that Mr. Martin was the true representative of the Ebner Company controlling the Ebner mine—Alaska-Ebner—or whatever that might be; I don't know just what they call themselves. I had every reason to believe that Martin was the proper man to receive that deed and I conveyed that for a consideration of $100. That consisted mostly of the surveying—I had that all surveyed in 1908 and Mr.

> Underwood had never paid me for the surveying, and the location notices, together with other matters, and the survey amounted to about $100, and I charged him that nominal sum in order not to be out anything that I paid on it" (Tr. Vol. III, p. 1127).

It thus appears that, in 1908, the property of appellee consisted of the Lotta, Taku, Keystone, Golden Fleece, Grand Review, Jewel and Crown Point patented claims, and the Parish No. 1, Cape Horn and Eureka unpatented claims, and the Cape Horn and Eureka mill sites; the Cape Horn No. 2 lode claim being the same as Cape Horn mill site. There is, therefore, no warrant, we submit, for the assertion by appellant that appellee was not the owner of the mill site, upon which the mill was to be erected, and to which the water was to be diverted, under the Tripp notice.

SECOND.

THE POSTING OF THE TRIPP NOTICE INITIATED THE RIGHT OF APPELLEE TO DIVERT THE WATERS OF GOLD CREEK TO THE CAPE HORN MILL SITE.

Appellant, under the title, "THE TRIPP WATER NOTICE AND ITS VALUE AS A MUNIMENT OF TITLE", says, on page 36 of its brief:

> "It will be borne in mind that this notice was posted at the old Ebner dam at the intake of the old flume. * * * * * * * * * * * There was nothing whatever in the notice to indicate that the water was to be taken out of the creek at any point above the Alaska-Juneau dam. If the paper was constructive notice of anything

> it was notice that no change in either the place or manner of use was intended. * * * * * * The 'Ebner Mine' as then known consisted of the group of patented claims shown on the diagram attached to the decree, commencing with the 'Lotta' and extending northward."

Our reply to these statements is contained in the three following subdivisions, under this heading of our argument.

1. The notice was sufficient to give notice of an intention to appropriate the water for the purposes now claimed by appellee.

It is true that the Tripp notice was posted on the Ebner dam, but how near the intake of the old flume, we think the evidence does not disclose. The notice itself, however, among other things, states that Tripp

> "claimed 10,000 miners' inches of water flowing in this creek, or any part of 10,000 miners' inches that may be flowing at any season of the year, to be conveyed by ditch, flume or pipe along the bank of Gold Creek on the southerly *side or to cross the creek with pipe or flume or both to any place on the property known as the 'Ebner Mine'.*"

This was a notice that Tripp could take the water anywhere on the Ebner property on either side of the creek, and does not indicate, as appellant states, that Tripp intended to use the water at the old air compressor or at the old Ebner mill. It cannot, we think, be plausibly contended that the notice evidenced an intent to divert the water from the old Ebner dam and to use it at the old air compressor on the Lotta claim; for, as appellant says (Brief p. 4) "the Ebner Company many

years prior to August 1, 1910" had thus diverted and used the water. The appellee, therefore, had the right by prescription to use the water at the old mill, and nothing could have been either gained or intended by posting the Tripp notice, except to acquire the water for use elsewhere on its property.

Appellant has surely overlooked the pleadings in this case, when it states that the notice did not show that Tripp, on the part of the appellee, intended to take the water out of Gold Creek above the appellant's dam. In paragraph V of appellee's answer (Tr. Vol. I, p. 33), there is the following averment:

> "Water has been appropriated and diverted from streams for said mining and other beneficial uses, and that ever since said date (meaning 1880) it has been the universal and general rule, practice and custom for any person or corporation desiring to appropriate water for said last above mentioned purposes to post a notice in writing in a conspicuous place at the *point of intended diversion.*"

The appellant, in paragraph III of its reply (Tr. Vol. I, p. 50), admits that it has been and is

> "the universal and general rule, practice and custom for those desiring to appropriate water to post a notice in writing in a conspicuous place *at the point of intended diversion*".

According to this admission, the notice need not state that the locator intends to divert the water from any particular place or point; for, under the custom, the *mere posting at a particular point would be notice that the appropriator expected to take the water from the creek at that point.*

We have shown that, at the time of the posting of the notice, the property of appellee consisted, in addition to the patented property mentioned in appellant's brief, of the following unpatented claims and mill sites: the Parish No. 1, Cape Horn and Eureka claims, and the Cape Horn and Eureka mill sites, the Cape Horn mill site being the same as the Cape Horn No. 2 claim, which latter claim, as we have shown, was taken up by Ebner for the appellee.

Appellant says (Brief p. 37) that the Parish lode No. 2, south of and adjoining the Lotta, was held by the District Court of Alaska, in other litigation between the parties to this cause, to have been a void location, and the area covered by it to have been public land, at the time that the appellant built its dam on the ground covered by that claim; and that this decision was affirmed by this court (210 Fed. 599).

This statement is evidently made for the purpose of suggesting that the notice, posted by Tripp, could not have indicated an intention to divert the water from the place of appropriation to the Cape Horn mill site, because the flume, by which it was carried to the mill site, might pass over the Parish No. 2 claim, which was held to have been a void location. But this suggestion is without force, because, it is admitted that, at the time that the Tripp notice was posted, appellee had taken steps to locate the Parish No. 2 and was in actual possession thereof. Besides this, the decision of this court (210 Fed. 599), affirming the decree of the lower court that appellee's location of the Parish No. 2 was void, also declared that the land covered by that claim was Govern-

ment land; and, this being so, under section 2339 of the Revised Statutes, granting rights of way for mining ditches across public lands, the provisions of which were extended to Alaska in 1900 (31 Stat., p. 329), appellee had the right to build its flume across Parish No. 2

See

Lindley on Mines, section 530.

2. The Tripp notice initiated appellee's right to the water.

Appellant, at page 47 of its brief, characterizes the Tripp notice in substance as

> not being sufficient to impart notice or to be of constructive notice to anyone; and further that constructive notice is always a creature of the statute and not of local custom * * * The notice posted could not operate constructively unless followed up with development in advance of intervening rights.

In answer to this view, it is, we think, sufficient to say:

First, that the posting of the Mulligan notice, under which appellant claims, was a trespass and appellant acquired no rights thereunder; second, that the work of appellee, in pursuance of its appropriation of the water of Gold Creek, was commenced before that of appellant, and, third, that under the universal custom which appellee pleads (Tr. Vol. I. p. 33), and which appellant admits in its reply, the posting of the notice of appropriation, without reference to its other contents at all, constituted notice of intention to appropriate the water at the place of posting and was the first step taken towards the appropriation and actual use of the water.

The case of *Van Dyke v. Midnight Sun,* 177 Fed. 85, is cited by appellant as announcing the doctrine that,

in Alaska, notice of appropriation of water upon the public land is not essential,

> "inasmuch as the statutes of Alaska make no provision respecting the necessity of either the posting or recording of notices of appropriation of water upon the public land".

But the decision in that case is, of course, not applicable here, because, in the *Van Dyke* case, there was nothing before the court to show any custom respecting the matter, while here it is directly averred in appellee's answer that it was the universal custom to post notice, which initiated the appropriator's rights, and this is admitted in appellant's reply. And, it is to be observed, appellant invokes the doctrine of the *Van Dyke* case only "if we are to assume that there was no local rule or custom on the subject". But, of course, in view of the admission made by the pleadings, there is no room for the assumption that there was no local rule or custom, requiring the posting of notice for the initiation of proceedings for appropriation of water.

As is said in the case of *Ison v. Sturgill,* 109 Pac. 580:

> "Notice shows *prima facie* an intention *from the date of its posting* to appropriate, and, if followed by diligence in the construction of the ditch, and diversion of the water, the right will relate from the time of giving the notice."

In *Wiel, on "Water Rights",* it is stated that, prior to any statutory provisions or rules, there was a custom of posting notice, and further:

> "Provisions of the several codes of California are merely to fix the procedure whereby a certain definite time might be established as the date to

which the title should accrue by relation'' (Vol. I, p. 399).

So, the custom of posting, which is admitted in this case, has the force of a statute and, under the pleadings, is admitted to be the first step taken looking towards the appropriation of water. It is stated in one of the early cases of California (*Morton v. Solambo C. M. Co.*, 26 Cal. 527, 532), that there is no distinction between ''custom'' or ''usage'', the proof of which must rest in parol, and a ''regulation'' which may be adopted at a miners' meeting and embodied in a written local law.

The trial court held that neither the Tripp nor the Mulligan notice complied with the so-called miners' rules and regulations, which the court found were not in force (Tr. Vol. VII, p. 2670).

It may be observed, moreover, that the Mulligan notice, considered under the so-called miners' rules, is more defective in form than the Tripp notice. The Mulligan notice (Tr. Vol. VI, p. 2133) neither states the *place of intended use* nor the number of miners' inches of water *measured under a four-inch pressure,* as is provided in those rules.

We submit that, under the custom admitted by the pleadings, the Tripp notice initiated the rights of appellee to the waters of Gold Creek.

3. Causes 803a and 804a of the District Court of the District of Alaska, Division No. 1, referred to by appellant in its brief, do not adversely affect appellee's case.

At pages 34 and 35 of appellant's brief, it is said:

''There is another significant circumstance supporting the suggestion that neither the Ebner Com-

> pany nor Tripp himself ever set up any claims under the so-called appropriation of water by Tripp. On August 25, 1910, the Ebner Company commenced a suit against the Alaska Juneau, complaining of the trespass committed by that company by reason of the interference with the waters of Gold Creek flowing through the Ebner property (Rec., Vol. V, p. 1963). On the same day a similar suit was commenced by Tripp (Rec., Vol. VI, p. 2155). In neither suit is there set up any claim to the waters of Gold Creek, either through the Tripp notice or otherwise, other than as riparian owners."

Again, on page 64 of its brief, appellant refers to the case above mentioned, and states:

> "On August 25, 1910, the Ebner Company commenced suit against the Alaska Juneau sounding in trespass, alleging the very acts and things done by the Alaska Juneau looking to the appropriation of the water, and in the complaint in that action the Ebner Company set up that the Alaska Juneau had ever since July 27, 1910, been engaged in removing timber and clearing up what appears to be a right of way for a flume, ditch or pipe line to convey the waters of Gold Creek, and that if these acts were continued the Alaska Juneau would divert the water of Gold Creek from the Ebner Company."

We will first take up for analysis the case to which appellant refers (Tr. Vol. V, p. 1963). As reference to it is made in the lower court as Cause No. 803a, we will refer to it by that number, instead of by title.

We cannot conceive how Cause 803a can afford any aid to appellant in the case at bar. It is true that Cause 803a was commenced by appellee against the appellant, but in the complaint in that case it was directly averred, contrary to the statement in appellant's brief, that the

appellee has at all times been the *owner of all the water of Gold Creek by reason of prior location, location and appropriation, and use of the same* (Tr. Vol. V, p. 1965). Further, it was alleged in the complaint in that case that Mulligan had gone on the patented Lotta claim and posted a notice of appropriation of water, being the same Mulligan notice which is involved in the case at bar, *that such action of Mulligan constituted a trespass,* and that appellant was endeavoring to take the water from the patented Lotta claim over other property of appellee, and appellee asked for a restraining order enjoining appellant from these continuous trespasses.

The suit to which appellant refers in its brief as being found in the record at Vol. VI, p. 2155, is a cause brought by H. T. Tripp against the Alaska-Juneau Company, and is designated as Cause 804a, and to this, also, we will refer by number, instead of by title. This last suit was commenced on the 25th day of August, 1910, the same date that No. 803a was commenced. It was brought by Tripp to eject the appellant in this case from the Taku Queen lode claim, the Auk Chief lode mining claim and the Mary Alice placer claim.

The two lode claims, mentioned in No. 804a, are the two claims to which we will hereinafter refer (subdivision 4 of "Fourth"), under another heading, as being property located by Tripp and held by him in trust for the appellee in this case. These two claims, as will be seen from appellee's exhibit "S", are located at the lower end of appellee's property. Tripp held the legal title to these claims at the time that this suit No. 804a

was brought, and he necessarily, therefore, brought the suit in his own name.

It is shown by the testimony of John R. Winn in Volume IV, p. 1222, of the transcript, that Case No. 804a was dismissed. We are at a loss to conceive how appellant can deem it significant that, in that case, there was no reference to an appropriation of the waters of Gold Creek when the action, as it appears on the face of the complaint, was brought solely for the ejectment of the defendant therein from the lands of appellee.

THIRD.

THE MINERS' RULES AND REGULATIONS, PLEADED BY APPELLANT IN ITS REPLY, WERE NOT IN FORCE OR EFFECT AND HAVE NO BEARING ON THE TRIPP NOTICE.

The only averment made by the appellee in its answer, with respect to any local custom pertaining to the acquisition of water, was that as early as the year of 1880 the miners in the vicinity of Juneau and Silver Bow Basin, where appellee's property lies, *adopted a custom of posting a notice on the stream from where the water was sought to be taken,* and at the place of diversion, stating that so many miners' inches of water were claimed to be taken from such creek and used for beneficial purposes (see paragraph V of Answer, Tr. Vol. I, p. 33).

The appellant in its reply, referring to this custom of posting of notice as the first step looking towards the appropriation of water, admits that, in connection with the appropriation of water for the purpose which is

mentioned in the complaint, it is the universal and general rule and practice and custom for those desiring to appropriate water, to post a notice in writing in a conspicuous place at the point of intended diversion (paragraph III of Reply, Tr. Vol. I, p. 50).

Of course, by reason of this admission in the pleadings, the trial court was compelled to make a finding that this custom of posting was in force (Tr. Vol. VII, p. 2647).

But appellant also claimed, in the lower court, that that portion of Article VI of the rules and regulations of the miners of Harris Mining District, which requires the recording of the notice, was in force and effect at the time the rights of the respective parties in this case were initiated, and was in force and effect at the time of the trial of the case. This article provides as follows:

> "Art. VI. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: first, he claims the water there flowing to the extent of (giving the number) inches, measured under a 6-inch pressure; second, the purpose for which he claims it and the place of intended use. A copy of the notice must within ten days after it is posted be recorded in the books kept by the recorder of the district."

The trial court found against this claim of the appellant (see Finding of Fact No. X, Tr. Vol. VII, p. 2670).

Appellant now urges that that part of Article VI above referred to, which requires a copy of the notice to be recorded within ten days was always in force and effect, but makes no contention that any of the remaining part of the rules and regulations was in force or effect.

Appellant admits in its brief (p. 43) that,

> *"A great deal of oral testimony was introduced by both parties on the subject of these rules, the Ebner Company contending that they had fallen into disuse, and the Alaska-Juneau asserting that they were continuously observed and in force."*

It seems to us that, by this admission, appellant has conceded that its contention with respect to these miners' rules and regulations is not open to it in this court, which will not disturb findings based upon conflicting evidence, unless manifestly erroneous.

It is not contended by the appellant that this finding is manifestly erroneous. In the event, however, that this court should desire to examine the evidence upon this subject, we desire to call to its attention the following evidence. To support its contention that the miners' rules and regulations were in force, appellant quotes from the testimony of the witness, Van Winkle. The testimony of this witness shows, however:

First, that out of 456 water location notices filed and recorded, there are 274 which simply have the date of the notice and have no date of posting; they show that they were filed within ten days from the date of the notice, but do not show when they were posted; that there are 35 which show, on their face, that they were recorded within ten days from the date of posting; that there are 34 which were not recorded within ten days of posting; that 95 of the notices do not show when they were posted, and were not recorded within ten days from the date of the notice, and bear no evidence to show that they were

ever posted; and that there are 18 without any date at all;

Second, that the rules were not followed with respect to showing a specific place of use, there being only 19 notices which designate the place of use; that 130 of the notices show no place of use; that 203 show a general place of use; and that 104 show that the water was to be used upon some claim, town site or mill site (Tr. Vol. V, pp. 1807 et seq.; Vol. VI, pp. 2367 et seq.).

An examination of the testimony of the various witnesses who testified concerning this matter will disclose that counsel for appellant, in introducing his proof in the lower court on these rules and regulations, read into the record what he claimed to be such rules, and then asked his witnesses to state their conclusion whether or not such rules had always been in force and effect. Upon cross-examination of the witnesses, their ignorance of the facts to which they had testified on direct examination was plainly shown. A great many of them had never located any water in the so-called Harris Mining District; a great many of them had never made any locations of water at all. A number of them had not, in recent years, had any talk with the miners within what used to be the boundaries of the Harris Mining District concerning what they understood the rules pertaining to the acquisition of water to be, or what they had been.

On the other hand, appellee called such witnesses as Captain J. T. Martin, who has resided in Juneau since prior to 1885, and who stated that he had never attended any miners' meetings, and that he had never heard of any miners' rules or regulations, pertaining to the acqui-

sition of water, discussed since back in the '80's. Martin also testified that, covering the period of his residence he had, to a large extent, been engaged in the mining business, and had never paid any attention to any such thing as "Miners' Rules and Regulations", in connection with the appropriation of water (Tr. Vol. V, pp. 1786, 1787).

Then there was the testimony of Tripp. He had resided in and about Juneau since 1896, and followed mining altogether; he was connected with the mining business ever since he went to that place; and a great many mining people and prospectors had talked with him. He stated that he never heard anything about such rules and regulations; that he had heard something about there being a Harris Mining District. He didn't know anything about the rules or customs or where the Harris Mining District was, or how much territory it contained; he had never heard anything about miners' meetings being held during his residence at Juneau (Tr. Vol. V, p. 1755).

William M. Ebner testified upon this subject. He is one of the oldest mining men in Alaska and has operated mines for years and made water locations and located mining claims. He stated that, as far back as 1891, he consulted with Judge A. K. Delaney, one of the old attorneys of Juneau, as to whether there were any miners' rules and regulations in force or effect, relating to the location and acquisition of water, and from this consultation and from conversations which he had with miners, he ascertained that there were no such rules or regulations (Tr. Vol. V, p. 1723).

F. J. Wettrick, a mining engineer and surveyor, also testified that he had had a great deal of experience with miners, relating to the location of water in Alaska, and that no definite rule upon this subject of recording notices had ever been followed by the miners (Tr. Vol. V, pp. 1687, 1688).

John Perelle and John Wagner, two other witnesses, testified that they were miners and had located a lot of water by posting notices, and they stated, substantially, that the custom which had been followed was to post the notice, but that there was no custom as to the time of filing or recording the notice (Tr. Vol. V, pp. 1758, 1764).

Neither Mr. Kinzie, superintendent of the Alaska-Juneau Company, nor Mr. Bradley, its president, at all times present in court, took the stand to testify concerning this question of miners' rules and regulations, pertaining to the acquisition of water. Moreover, in making out the Mulligan notice, the appellant in nowise complied with the rules with respect to the contents of the notice. This circumstance, we submit, is most persuasive evidence against the contention of appellant that the miners' rules and regulations, if any such ever existed, were in force or effect or have anything to do with the case at bar.

In conclusion on this subject, we feel justified in asserting that the conclusion of the trial court, that these rules and regulations were not in force or effect, was the only conclusion which the court could, under the evidence, have reached. Since 1882, too many changes

have taken place to attempt to make any application of these rules and regulations. It is shown by the record of this so-called organization in the Harris Mining District that, if it ever did exist, it extended only along the sea shore from what is known as Salmon Creek to Taku River, or where the Taku River empties into salt water, one river being to the north of Juneau and the other to the south of Juneau, and thence this district extended fifteen miles back from the shore line. This would have given the district an area of 15 miles by about 10 miles. At the time of the alleged passage of these rules and regulations, there was only a small area of southeastern Alaska in which gold had been discovered. Since then conditions have greatly changed, and in 1910, when, it is claimed by the appellant, these rules and regulations were in force, mining was being carried on from the north of Juneau, at Berners Bay, to the south of Juneau, below Wrangell, a distance of fully 150 or 200 miles, and thence to the westward as far as the boundaries of Alaska extend. Besides, since the time that appellant claims these rules were passed, the civil law has been extended to Alaska, recording districts have been formed, but the boundaries of the Harris Mining District were disregarded in the formation of the Juneau Recording District. No meeting of the miners has been called since the 5th day of February, 1888, at which time it appears that a quarrel existed among the miners and a dispute arose over the fact whether or not the mining district should be kept up. Those who opposed keeping up the organization were successful, and for

the last time elected their recorder for one year, and the records of the whole of Harris Mining District were left for safekeeping with the United States Commissioner, and ex-officio recorder, which latter position was created by the Act of 1884, extending civil government to Alaska.

We respectfully submit that the evidence amply supports the finding of the trial court, that no miners' rules and regulations had been or were in force.

FOURTH.

TRIPP POSTED, ON BEHALF OF THE APPELLEE, THE WATER LOCATION NOTICE ON THE 20TH OF JUNE, 1910, CLAIMING 10,000 MINERS' INCHES OF THE WATER OF GOLD CREEK, AND THIS NOTICE, AND THE WORK THEREAFTER DONE BY TRIPP UNDER IT, WAS FOR THE APPELLEE.

In 1908, and at the time that Tripp was employed by appellee, its property, as we have shown, consisted of the Lotta, Taku, Keystone, Golden Fleece, Grand Review, Jewel and Crown Point patented claims, and the Parish No. 1, Cape Horn and Eureka unpatented claims, and the Cape Horn and Eureka mill sites. The Cape Horn No. 2 lode claim was afterwards located by Ebner over the Cape Horn mill site for the benefit of appellee.

Under this head of our argument, we propose to show that it was for this property that Tripp appropriated the water of Gold Creek, and that the work which he did and the plans which he formulated were in furtherance of the general scheme which had been formed for the operation of this property.

1. Tripp was employed by Underwood, the owner of the majority of the capital stock of appellee, to operate appellee's property.

In 1908, soon after Ebner sold out his interest to Underwood, which consisted of practically all of the capital stock of the appellee, Underwood employed H. T. Tripp, a mining man and engineer, to take charge of the appellee's property and to examine the same and report on the feasibility of opening up and mining the property on a larger scale than had theretofore been done.

Ebner testified that Tripp was employed by F. L. Underwood, the purchaser of Ebner's interest, which was a large majority of the stock of appellee, and that Bent was in some way connected with Underwood and the California-Nevada Copper Company and had something to do with the employment of Tripp (Tr. Vol. III, p. 1087).

John R. Winn, one of the witnesses for appellee, testified that Bent was the manager of the California-Nevada Copper Company, a corporation (Tr. Vol. IV, pp. 1226, 32). Tripp testified that he was employed by F. L. Underwood.

The following letter was written by Underwood to Tripp, and will show that he employed Tripp and in what capacity:

"The California-Nevada Copper Company,
115 Broadway, New York.
October 19th, 1909.

H. T. Tripp, Esq.,
Juneau, Alaska.

Dear Sir:

I have been industriously working to get a large

amount of working capital so that our minds could be at rest as to how much we could spend and soon could determine where our expenditure should best be made.

I now have as definite a promise of working capital as we will ever get. The arrangement should be concluded in a very few days.

I want you to find now the best millsite you can for the Ebner property as things now stand, for as I said no arrangement can be made for the Jualpa placer, and we want to get something fixed and probably everything will be worked in the Gold Creek Basin where we will build a 200 stamp mill next year. When you have settled on the spot for the mill, you can plan your tunnel, winze, etc. If my plans carry I can soon get out to you.

Very truly yours,

F. L. Underwood."

(Tr. Vol. VI, p. 2163).

Tripp further testified concerning his employment:

"I have been told and was told by Mr. Underwood that he had the Ebner mine and that he wanted to get adjoining properties to that, and I was out here looking around for that purpose, and never had any special occasion to ask anything of the Ebner mine, or ask them for possession, until I wanted to get to sampling; then I asked Mr. Ebner for the keys to the boarding house and the property, and told him I was then ready to commence operations, and I put an assay office up there, started the boarding house, and the watchman, who was the keeper for Mr. Ebner, then went to work for me" (Tr. Vol. II, p. 536).

He further said, in substance:

I met the directors of the Company (referring to California-Nevada Copper Company) while I was in New York, and the Secretary of the Company, but I was hired by Mr. F. L. Underwood and

the contract was made out on the California-Nevada stationery and Underwood was connected with the California-Nevada Copper Company (Tr. Vol. II, p. 539).

There were further declarations made by Tripp during his direct and redirect examination, showing that he was employed by Underwood, the purchaser of Ebner's interests in appellee, which was practically all of its shares of stock, as heretofore stated. We will show later that the California-Nevada Copper Company succeeded to the Underwood interests in appellee, and became the owner of all the shares of stock of appellee; and that Tripp was, toward the close of his work upon this property, looking to the California-Nevada Copper Company for his pay.

Tripp commenced his work in 1908 and continued until about August 3, 1910, and was in full control and possession of all the property of appellee during that time.

2. Tripp's plans with relation to, and his operations upon appellee's property contemplated the diversion of the water to the mill site at Shady Bend.

Tripp testified that the nature of his work was to find out the best location, most suitable to open the mines in a businesslike way, and that he examined every place along the line of the creek, had measurements made, mapped, and finally determined on the place for the mill at Shady Bend, near where the tunnel is now located and run; that the place to build the mill, as determined by him, was a short distance from where Mackay afterwards graded off the mill site and about

where the little stamp mill now stands (Tr. Vol. II, p. 513), on Cape Horn No. 2 lode, or known as Cape Horn mill site; and that the tunnel which he had determined to run would crosscut the formation of appellee's property, commencing down at Shady Bend (Cape Horn mill site, or Cape Horn No. 2 lode), up to the old workings of the appellee, near the 15-stamp mill, practically on the same line that Mackay afterwards ran the tunnel (Tr. Vol. II, p. 514).

Tripp kept in constant communication with Underwood and made all reports of his progress in his work to him. The letter above set forth is one of the many letters written by Underwood to Tripp (Tr. Vol. II, p. 514). Tripp, in 1909, stripped off the surface ground along the line of his long tunnel and blasted and cut in and faced it up and got ready to commence work on it (Tr. Vol. II, p. 515).

In connection with this work upon the tunnel, and also as showing that Tripp had full authority to locate and lay out the tunnel for appellee, as he did, we call the court's attention to a letter written by Tripp to Ebner, and to one written by Ebner to Tripp, which were offered in evidence as appellee's exhibits "F" and "E", respectively, without objection.

DEFENDANT'S EXHIBIT "F".

"Juneau, Alaska,
Sept. 25th, 1909.

Wm. M. Ebner, Esq.,
Juneau, Alaska.

Dear Sir:

In consideration of a communication, bearing even date with this letter, has been received by me, set-

ting forth that you are the owner of one Lode Claim called 'Cape Horn Number Two', and located in Julapa Basin and joining 'Cape Horn' Claim on the Southwest.

Having in company with you selected a location which we have jointly agreed upon as being the proper location for a tunnel to the Ebner Mines. Being desirous of having assessment work done in a proper place, where it will be a benefit for the 'Cape Horn' Claim, the 'Cape Horn Number Two', and the 'Eureka' Claim, as well as for the common benefit of all mines Northerly and Easterly from this point on the Juneau Belt.

As the agent for the California Nevada Copper Co., and F. L. Underwood, I agree to do this assessment work, amounting to three hundred ($300.00) dollars, for the special benefit of the three claims, 'Cape Horn,' 'Cape Horn Number Two' and 'Eureka,' for the year 1909.

Respectfully yours,

H. T. Tripp."

(Tr. Vol. VI, p. 2164).

Defendant's Exhibit "E."

"Juneau, Alaska, September 25, 1909.

H. T. Tripp, Esq.,
Supt. Calif. Nevada Copper Co. and
F. L. Underwood,
Juneau, Alaska.

Dear Sir:

In view of the fact that F. L. Underwood holds in escrow one certain deed conveying one Cape Horn and Eureka Lode Claim, upon which the assessment work for the year of 1909 must be performed for the purpose of holding the same and complying with the law, and for the further fact that said F. L. Underwood has agreed to do said assessment work.

I being the owner of one lode claim called the Cape Horn No. 2 and a proper place for starting a

> long working tunnel, I make to you the following proposition: That all the assessment work on these three claims, Cape Horn, Eureka and Cape Horn No. 2 be performed in starting this tunnel. I will further state that negotiations are now pending for the transfer of Cape Horn No. 2 to the said F. L. Underwood. It is the intention that in the final settlement Cape Horn No. 2 will be transferred to the said F. L. Underwood.
>
> Yours respectfully,
>
> WILLIAM M. EBNER."
>
> (Tr. Vol. VI, p. 2165.)

It has been shown by the testimony of Ebner that he made this location of the Cape Horn No. 2 lode claim, above referred to in the letter, in 1908, over the Cape Horn mill site, and made it especially for Underwood, and for appellee's benefit, as there was quartz found upon it and as it was safer to hold it as a quartz claim than as a mill site.

Tripp was present when the location of the lode claim was made and reported to Underwood. Tripp, in speaking of the Cape Horn mill site, stated, in substance:

> I knew there was a mill site located down there, which was considered a part of the *Ebner Mine, and it was talked over as being a mill site that belonged to the Ebner property and was considered such* (Tr. Vol. II, pp. 541, 542).

Tripp, on cross-examination, when being asked about the nature of his employment, testified that his examination of the property was not in order to find out whether the property was or was not good property to buy, "because they (referring to Underwood) had already had some understanding about buying it;" but that the

purpose of his examination was to find out about enlarging the property, to see what the extent of it was, and to get at the most feasible way of working it (Tr. Vol. II, pp. 543, 544).

Tripp further testified that he followed out the directions of the Ebner letter, above set forth, and commenced running the tunnel at the place indicated by Ebner, and that the work done thereon served the twofold purpose, to wit, the commencement of the tunnel and the performance of the assessment work upon the mining claims referred to in the Ebner letter (Tr. Vol. II, p. 578).

The trial court, after hearing all the testimony and evidence upon the nature of Tripp's employment and what he was doing, made its Finding No. III (Tr. Vol. VII, pp. 2644, 2645), part of which is as follows:

> "That said Tripp made a thorough examination of the property, its formation, the ore body or bodies, and the water of Gold Creek flowing there through, and reported favorably on what the said Ebner and Ebner Gold Mining Company had concluded to do. That Tripp completed his work and made his report about the last of June or first of July, 1910."

We have thus far shown that Tripp was employed by Underwood, at the time that Underwood owned practically all the shares of the capital stock of the appellee, and that he either bought or had options on all of the mining claims and mill sites that had been located by Ebner for the benefit of appellee's property. Therefore, it cannot be questioned that anything that Tripp did,

under this employment, was done for appellee and for the benefit of appellee's property.

Tripp, having decided upon a plan for opening up and mining the property on a larger scale than Ebner had operated it, and having determined to commence the large working tunnel on the Cape Horn No. 2 lode claim, or mill site, and to build a mill in that same vicinity, and while having all these matters under consideration, and while employed as above stated, on the 20th day of June, 1910, posted his notice of water location or notice of appropriating and taking from Gold Creek at the old Ebner dam (on the Golden Fleece lode claim of appellee) 10,000 miners' inches of water, intending to convey it by flume or pipe line, or both, to the place of commencing the tunnel, and to build the mill at Shady Bend on the Cape Horn No. 2 claim, known also as the Cape Horn mill site.

Tripp's scheme for conducting of the water from the old Ebner dam to Shady Bend was to take it down the southerly side of Gold Creek, conducting it from the old Ebner dam, through the old flume line of the appellee, down to the pen stock, just above the air compressor which Ebner had built on the Lotta claim, thence from that pen stock, down and across the creek to Shady Bend or Cape Horn No. 2 claim or mill site, and there to apply it to use and return the water to Gold Creek. The plan which Mackay had, as we shall hereafter show, was to convey the water from the old Ebner dam to Shady Bend or Cape Horn No. 2 lode claim or mill site, on the opposite side of the creek; he intended to apply it, however, to use at the same point

at which Tripp would have applied it, had he carried out his plan—*which point was below the intake of appellant's flume.*

Appellant, in its brief, has given a synopsis of what it conceives Tripp's testimony to have been. But that synopsis is unsatisfactory, disjointed, and to some extent an erroneous construction of Tripp's testimony concerning the water right in controversy. This testimony is important and we, therefore, quote some of it *verbatim,* especially that concerning the posting of the notice of the appropriation of 10,000 miners' inches of water, his intention in so doing, and other matters connected therewith. After he had testified concerning the posting of the notice on June 20, 1910, the following occurred:

> "Q. What purpose did you have in view in putting up this water notice that you have just testified concerning?
>
> A. I had received a cablegram from Mr. Underwood telling me to commence work immediately on the construction of the flume carrying the water out of Gold Creek, and at that time I went up there, or a day or two afterwards, and located this water with the expectation to commence work and build a flume and convey the water down along the plans and lines that I had in view.
>
> Q. Down to near this point where you had commenced this tunnel at Shady Bend?
>
> A. Yes, sir.
>
> Q. How near the point had you expected to bring the water with reference to the end of the new high line flume of the Ebner Company as it is constructed?
>
> A. Well, my idea was to have gone down where the line of the old Ebner flume is and I would have

> built a new flume on a little different grade, and would have connected up a pipe line with the air compressor that is now located there, which I had repaired and put in proper shape to be used, and with the air from that compressor I would have blown out a line for a pipe around Cape Horn, and to this place practically where the mill site is now below Shady Bend; that is the plan that I had laid out" (Tr. Vol. II, p. 522).

He further testified, with reference to his preparations to apply the water so appropriated by him for the working of the Ebner property, as follows:

> "Q. I will ask you, Mr. Tripp, if you had any machinery or air compressors, or anything of that kind on hand in 1910, which was calculated to be used in the opening up of this property as you had decided to do?
>
> A. I had purchased an air compressor and had it stored down here in Juneau and had drilling machinery and the necessary equipment for an air compressor" (Tr. Vol. II, pp. 526, 527).

In 1910, when Tripp repaired the appellee's dam and the flume line between the dam and the air compressor on the Lotta claim, he did so for the purposes,

First, of applying the water to use at this compressor on the Lotta claim, for the purpose of starting up the work under his new plans; that is, in connection with grading off a flume line, for a flume extending from the end of the old flume, just above the air compressor on the Lotta claim, around to Shady Bend;

Second, of having the dam in good repair for the taking of the water through the old flume and connecting it up with the new flume line which he expected to construct around to Shady Bend; and

Third, of running the dynamo to generate electricity for general use around the premises.

In connection with these matters and to verify the statement that we have just made, we here quote Tripp's testimony, as follows:

> "Q. Now, Mr. Hellenthal also asked you a number of questions concerning the repair of the dam, when you made it, I think in 1910, you were repairing the dam for the use of the water for what purpose, if any?
>
> A. Well, we had been running the electric lights that had been used in the assay office and around the place generally, and I had put the dam in order at that time to have it so we could turn the water on at any time we needed it to run the dynamo or the compressor, either.
>
> Q. What were you expecting to use the compressor for?
>
> A. I calculated to use that compressor, the first time I used it, in blasting out a right of way for a pipe line and whatever we would need after we built the flume to the compressor.
>
> Q. That is, there was an expectation to use it in connection with the new flume line?
>
> A. There was.
>
> Q. Where were you expecting to build this new flume line to—to what point, Mr. Tripp?
>
> A. It was my idea to run it along the line of the old flume, to pass where the end of it is now, and then conduct the water by pipe down across the Gold Creek Canyon and around Cape Horn to where we proposed to set up our compressors and so forth.
>
> Q. That was the plan that you had in mind at the time you were doing this repair work on the dam?
>
> A. That was the outline that had been adopted; Mr. Huntoon had been sent up here as an engineer

to consult with me, and I had gone over the whole proposition with him.

Q. Who was Huntoon—do you remember by whom he was sent here?

A. Was sent here by Underwood'' (Tr. Vol. II, p. 567).

Re-Cross Examination by Mr. Hellenthal.

''Q. When was this Mr. Huntoon here, Mr. Tripp?

A. Huntoon was here just before the arrival of the Bent party. I think he was here up to the time they arrived. That was in July, 1910'' (Tr. Vol. II, pp. 566, 567).

''Q. Now, when you posted your notice of location for the water, it was your intention to appropriate the water and carry it to whatever mill site might afterwards be selected by the company, wasn't it?

A. That was not my intention'' (Tr. Vol. II, p. 568).

''Q. That is true, the location for the appropriation of the water was for the new mill wherever it might be?

A. Certainly would be; but, however, that isn't the question that you asked me before—you asked me as to my judgment or my opinion, or something of that sort. My intention was to convey the water to that place at Shady Bend where I told you that I had located a place for a tunnel and for a mill site.

Q. You had located a place for the tunnel and mill site, had you?

A. Yes.

Q. And the appropriation of the water was for whatever place the Company might afterwards decide to build the mill on; is that right?

A. The appropriation of the water was to be used for the benefit of the mill'' (Tr. Vol. II, p. 569).

Appellant states in its brief something to the effect that Tripp never communicated to the appellee, or to those who succeeded it in the work on appellee's property, anything about his having posted the water location notice (Brief, p. 33). This matter was also referred to at the oral argument, when counsel for appellee asserted that counsel for appellant were wrong, and that John R. Winn, who was attorney for appellee and the California-Nevada Copper Company, later known as the Alaska-Ebner Gold Mines Company, had spoken to Tripp about this notice, about the time that he, Tripp, quit the employ of Underwood, or of the above mentioned companies, and that this was on or about the 3rd of August, 1910; that Tripp made a search for a duplicate copy of the notice and failed to find it, and then made a trip out to the westward on some mining business and did not return until October of that year. The testimony upon this matter is as follows:

John R. Winn testified that he had resided in Juneau since 1897, and that he was familiar with the Ebner property ever since and before Ebner disposed of his stock to Underwood; that he had been attorney for the Ebner Gold Mining Company for several years, and also attorney for the Alaska-Ebner Gold Mining (Mines) Company, or the California-Nevada Copper Company, and had business for all these companies, and was attorney for the Ebner Gold Mining Company prior to 1910 (Tr. Vol. IV, pp. 1218, 1219).

Tripp testified, in substance:

> I gave the water notice to Judge Winn (meaning John R. Winn), after I came back from the

> westward. That I gave it to him as soon as I found it. I don't think that I got back from the westward until sometime in October, and that I left for the westward sometime about the 11th of August (1910). My wife told me that Judge Winn had been up to my house and that they ransacked everything in the shape of documents and papers to find that notice. He (meaning Winn) asked me before I left, but I couldn't find it (Tr. Vol. II, p. 579). I didn't know where I had put it. It (the notice) wasn't lost; it was in my safe in the C. W. Young Company's building (Tr. Vol. II, p. 579).

3. All acts done by Tripp with respect to appellee's mining property inured to the benefit of appellee.

Appellant repeats, in several forms in its brief, that Tripp was a stranger to appellee, and, hence, that what Tripp did, did not inure to the benefit of appellee, especially as, appellant asserts, the appellee claimed no right under the Tripp water location notice. No warrant for this assertion is found in the record.

(a) The water right appropriated by Tripp became appurtenant to appellee's land.

The water was to be taken out of the creek at the place where Tripp posted his notice on the patented Lotta claim, the property of the appellee, and was to be conveyed over the property of appellee, and to be put to use on its Cape Horn No. 2 lode claim, or Cape Horn mill site, and afterwards returned to Gold Creek off the premises of appellee. This water right and flume and right to the use of the water, being all upon appellee's property, were intended to become, and became, appurtenant to its property and a part of it. No con-

veyance could be made of them by Tripp, for the reason that he did not own any interest in the property from which the water was taken, over which it was conducted, nor the property where it was put to use. The water was appurtenant to the property for the further reason that it was taken up to mill the ore to be mined on the property. And, moreover, it was appropriated by Tripp as the agent of Underwood, who, as a majority stockholder in appellee, represented the appellee, as did all of Underwood's successors to his interest in the stock of appellee.

(b) A majority stockholder represents the corporation, and everything done by him, with reference to the corporation's property, inures to the benefit of the corporation.

Underwood was the holder of a large majority of the stock of the appellee. Therefore, his work on the appellee's property must have been as agent of the appellee. In any view, he bore a fiduciary relation to the company. Consequently, any additions or betterments which he, or his agent, Tripp, made on the property, necessarily accrued to the benefit of the company. The relationship of a majority stockholder to the company is well stated in *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 393, 394, as follows:

> "The holder of the majority of the stock of a corporation has the power, by the election of biddable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders

of the minority of the stock. He draws to himself and uses all the powers of the corporation. In effect he holds an irrevocable power of attorney from the minority stockholders to manage and to sell the property of the corporation, for himself and for them. * * *

This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a *fiduciary* or *agent,* to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence *to make the property of the corporation produce the largest possible amount,* to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property."

See also:

Jones v. Missouri-Edison Electric Company, 144 Fed., 771;

Union Pacific R. Co. v. Frank, 226 Fed., at page 920;

Davis v. Virginia Ry. & Power Co., 229 Fed., at page 640;

Sidell v. Missouri Pac. Ry. Co., 78 Fed., page 727;

Ervin v. Oregon Ry. & Nav. Co., 27 Fed., page 631;

Meeker v. Winthrop Iron Co., 17 Fed., page 48;

Sage v. Culver et al., 41 N. E., page 513.

4. The property acquired and located by Tripp was held by him in trust for the appellee.

We have already shown that Underwood and his successors in interest, who employed Tripp, were majority

stockholders in appellee and that everything done by them or by their agent, Tripp, was for the benefit of appellee. We have related some of the things which were done by Tripp looking towards the opening up, developing and the mining of appellee's property on a larger scale than had been done by Ebner. However, we have not given all that Tripp did in respect to carrying out this undertaking.

In addition to the posting of the notice of location and appropriation of 10,000 miners' inches of water of Gold Creek, as an incident to carrying out his undertaking and scheme of opening up and working the property, and the other work done by him, Tripp also found some vacant ground that he thought would be of some benefit and help to appellee in perfecting what he, Tripp, had undertaken to do; and, while in the employ of Underwood or the California-Nevada Copper Company, he located the following lode mining claims: The Auk Chief lode mining claim and the Fractional lode mining claim; and also purchased of one Thomas J. McCully the Taku Queen lode mining claim (Tr. Vol. VI, p. 2260). These claims all appear upon defendant's exhibit "S", and their relative position to the remaining property of appellee can readily be seen by an inspection of this exhibit (Tr. Vol. VII, p. 2681).

All of the property above referred to, except the Fractional lode claim, was made the subject of the suit in ejectment, No. 804a, to which reference has above been made.

It is contended by appellant that Tripp was claiming this property adversely to the appellee (Brief p. 37).

The only evidence to support this contention is the complaint, in suit No. 804a (Tr. Vol. VI, p. 2155). This suit, as above stated, was begun in the name of Tripp, solely for the reason that the paper title at that time was in him; and the suit was, of course, instituted by him for the benefit of appellee. The case was afterwards dismissed (Tr. Vol. IV, p. 1222). Tripp claimed that appellant was trespassing upon this property and he very properly sought to protect the property for the appellee by suing in his own name, as the paper title was in him. The testimony, moreover, shows that Tripp, as a representative or agent of appellee, and for appellee and not otherwise, took up the property and bought the claim from one McCully (Tr. Vol. IV, p. 1222). These claims were identified by the witness, John R. Winn, as having been held in trust by Tripp for appellee (Tr. Vol. IV, p. 1273).

As Tripp, as we have heretofore shown, went upon appellee's property with the view of devising plans for operating it for the benefit of appellee and, as the adjacent property, taken in Tripp's name, was taken in pursuance of his plan for operating appellee's property, it is entirely clear that this adjacent property was held by Tripp in trust for appellee.

Judge Lindley, in Volume 2 of his work on Mines, paragraph 407 states the rule thus:

> "An agent cannot make a profit for himself out of the business in which he is engaged for his principal or make use of the information obtained through his employment to acquire interests in the subject matter of his agency adverse to those of his principal."

In *Pomeroy's Equity Jurisprudence,* Volume 2, section 959, it is said:

> "* * * if he (the agent) has taken the legal title to property in violation of his fiduciary duty, equity will treat him as a trustee thereof for his principal."

It cannot be open to doubt, therefore, that the new property, located by Tripp, and which adjoined the claims of appellee, and which was located by Tripp for the better working of the original claim of appellee, became the property of appellee.

5. Tripp's conveyance to Hoops cannot derogate from the correctness of this conclusion.

On April 4, 1912, it appears that Tripp made out a paper writing purporting to convey these claims, together with "that certain ditch and water right to 10,000 miners' inches of water flowing in Gold Creek" to one H. W. Hoops (Tr. Vol. VI, p. 2263). On March 10, 1913, Hoops attempted to convey this property and the water right and ditch to one Sidney J. Jennings (Tr. Vol. VI, p. 2267). On May 21, 1914, before the trial of this case, appellee received the paper title to the property, which had been taken up for it and had been held in trust for it by Tripp, through what purports to be a deed from Sidney J. Jennings to appellee (Tr. Vol. VI, p. 2271).

The conveyance from Tripp to Hoops, even if the latter had been a stranger to appellee, could amount to nothing more than a declaration by an agent against the interest of his principal, with relation to property which

the principal owned, and could not be evidence against the principal. But Hoops, at the time he received the conveyance from Tripp, was a creditor, stockholder and bondholder in the California-Nevada Copper Company, which was the owner of the shares of stock of the appellee, or at least of the Underwood interest, and this company thereafter became the owner of all the shares of stock of the appellee. Hoops, in addition to standing in the capacity above mentioned with relation to appellee, had been assisting in raising money to carry on the operations under Mackay, and understood the situation entirely (Tr. Vol. IV, pp. 1236, 1237). It is, therefore, clear that the conveyance to Hoops was no evidence whatever of any understanding by Tripp that he did not hold the property as agent and trustee for appellee.

6. The activities of the California-Nevada Copper Company, the name of which was changed to Alaska-Ebner Gold Mines Company, inured to appellee's benefit.

The California-Nevada Copper Company and the Alaska-Ebner Gold Mines Company were and are one and the same corporation. The company had its name changed from the former name to the latter. This was done some time after Tripp had commenced working on appellee's property (see testimony of John R. Winn, Tr. Vol. IV, pp. 1226, 1227, 1233).

The California-Nevada Copper Company and Underwood were, in the first instance, raising the money for Tripp's operations. Later on, the "Chapman" com-

mittee and the Copper Company together were raising money for the work (Tr. Vol. IV, p. 1227).

The California-Nevada Copper Company, before changing its name to Alaska-Ebner Gold Mines Company, gave a mortgage to the Standard Trust Company of New York and Edward M. F. Miller, trustees. This mortgage is dated December 15, 1907, and was offered in evidence by appellant and marked "Plaintiff's Exhibit No. 39", and is found at page 2010 of Volume V of the Transcript. This mortgage covered after-acquired property. The "Chapman" committee, above referred to, succeeded in procuring for the mortgagor, the California-Nevada Copper Company, the entire capital stock of appellee, including, of course, the stock which Ebner had sold to Underwood; and all this stock became subject to the mortgage (Tr. Vol. IV, pp. 1229, 1230). The mortgage was foreclosed and the stock sold in the State of New York (Tr. Vol. IV, p. 1229), in either 1912 or 1913 (Tr. Vol. IV, p. 1238).

As heretofore noted, appellant states in its brief something concerning a suit which Tripp brought against the California-Nevada Copper Company to recover wages due him for his services. The above and foregoing explanation shows plainly why Tripp sued that company instead of Underwood. The Copper Company had succeeded to Underwood's interest; it got from him the stock of appellee, sold to him by Ebner, and it finally became the owner of all the stock of appellee; and, during the year of 1910, the California-Nevada Copper Company furnished all the money to carry on the work on appellee's property (Tr. Vol. IV, p. 1235).

It thus appears that Underwood and the Copper Company, in all their activities respecting the appellee's property, as majority stockholders in appellee, were acting in behalf of appellee.

Fifth.

THE WORK ON THE PROPERTY OF APPELLEE PLANNED BY EBNER AND COMMENCED BY TRIPP WAS PROSECUTED WITH DILIGENCE BY MACKAY AND MUIR FOR APPELLEE.

It has been shown that Tripp retired from the service of Underwood and the California-Nevada Copper Company, representatives of appellee, about the first of August, 1910, and that Angus Mackay succeeded Tripp. It is now our purpose to show that the work on the property, planned by Ebner and commenced by Tripp, was carried on with diligence by Mackay and one Muir for the appellee.

1. The work was carried on with diligence on behalf of appellee.

We will, first, show that Mackay was employed by Underwood and the California-Nevada Copper Company for appellee; second, that he held possession of the physical property of appellee as receiver thereof; third, that he was employed, while receiver, by the United States Smelting, Refining & Mining Exploration Company, optionee of all of the shares of stock of the appellee, and that all the work which he did on the property, was for appellee and for its benefit; and, fourth, that one Muir, as well as Mackay, was employed by the

United States Smelting, Refining & Mining Exploration Company, as optionee of all of the shares of stock of appellee, and that they did work for the appellee and for its benefit.

At the risk of repeating some of the testimony we will point out the evidence material in this connection, so that the discussion of this subject may be completely before the court.

Ebner testified that Mackay, after Tripp had retired from the service of Underwood and the California-Nevada Copper Company, he took charge of the work for Underwood and the California-Nevada Copper Company (Tr. Vol. III, pp. 1086, 1087). Bent was the general manager of the California-Nevada Copper Company and Mackay was Bent's assistant (Tr. Vol. IV, p. 1235). Mackay testified that he made arrangements with F. L. Underwood in New York to go to Juneau and build a mill on appellee's property; that he stopped on his way from New York in Chicago to see about the machinery for the mill, and stopped in Seattle, Washington, to commence getting out the timbers and lumber for the mill (Tr. Vol. II, p. 719). The agreement which Mackay had in New York with Underwood was made about the first of June, 1910. Mackay was to come out to the Coast, stop at Seattle, and get out the timbers and lumber for a 200-stamp mill, to be built upon appellee's property. Mackay left New York shortly after having made this agreement with Underwood, stopped at Chicago for the purpose above mentioned, and arrived at Seattle about the 10th of June, and commenced preparing the timbers and

lumber at Seattle for the 200-stamp mill, some time in the month of July, 1910 (Tr. Vol. II, p. 695). Bent and his party arrived in Juneau in July, 1910.

On the 3rd day of August, 1910, Bent and some of his party, and Mackay and Hill & Wettrick, surveyors, went upon the Ebner property and made some observations, secured some data and information, which they afterwards used in laying out the scheme of development which they had under discussion (Tr. Vol. II, p. 605).

Hill & Wettrick took some levels for the purpose of securing data necessary to determine how the scheme of development should best be carried out (Tr. Vol. II, p. 606). They had directions from Bent and his people about taking the levels, and had in view, particularly where the line of the new flume should be run. The reason that they projected levels across from the old Ebner flume to the opposite side of the canyon, was to determine the line of grade which the new flume would follow along the hillside, leading from the Ebner dam on Golden Fleece lode claim toward Cape Horn on the Cape Horn Lode No. 2 claim—all the property of appellee. They were instructed by Bent and Mackay to make such examination and report; and the object of taking such levels was to avail themselves of the increased head of water obtainable in that way and thereby to develop more power. The power was to be used at Shady Bend in connection *with operations which were planned and discussed by Bent and his party, including Mackay* (Tr. Vol. II, p. 607). The line, which was being sur-

veyed by Hill & Wettrick, was on the northerly side of Gold Creek. The matter of excavation for the 200-stamp mill was discussed, and the point in view was in the vicinity where the excavation was afterwards made (Tr. Vol. II, p. 608).

In this connection, we call attention to Ebner's testimony, that he had a survey made of the contemplated flume line, before he sold out his interest to Underwood, and that this survey was precisely at the same place which Wettrick surveyed out and where the flume was afterwards constructed; that is, the new flume on the property of appellee. Ebner further testified that he and the appellee had settled upon the place to commence the tunnel, and in his letter to Tripp, under date of September 25, 1909, as set forth in this brief (Tr. Vol. VI, p. 2165), he indicated to Tripp the place which he had decided upon to commence the tunnel, being about 50 or 60 feet from where the tunnel was afterwards actually commenced and has been driven; all on Cape Horn No. 2 lode claim, and on the Cape Horn mill site.

The only difference in the plans of Ebner, Tripp and Mackay was that Tripp had contemplated taking the water from the old Ebner dam, down through the old Ebner flume to where the penstock was built just above the air compressor on the Lotta lode claim, then to convey it down the creek from this penstock in a new flume or pipe line on the southerly side of the creek, crossing over the creek with the flume, and to apply it to use for the working of the property on the Cape Horn No. 2 lode claim; while Bent and Mackay adopted the Ebner

plan and took the water through a new flume from the Ebner dam and conveyed it down the northerly side of the creek to the Cape Horn lode or mill site and to the same spot where Tripp had expected to take it. In either case, the point of application of water to use by appellee was below the intake of appellant, and affected appellant in the same way.

Wettrick, the surveyor of Bent, states that he was not called upon, when he went on the ground, on August 3, 1910, at the request of Bent and his people, to make a survey of any other flume line than the one upon which the new flume was afterwards built, and that he had an understanding with Bent before they went upon the ground that he, Wettrick, was simply to survey out this flume line, and no other, and that no other place was contemplated for a mill site by Bent and Wettrick and Mackay, than the mill site which Mackay afterwards graded for the purpose of erecting the 200-stamp mill (Tr. Vol. II, pp. 678, 691, 692, 697).

We have dwelt upon this point at some length, in order to meet the suggestion of appellant that there was never any common plan agreed upon by appellee, or those acting in its behalf, concerning the opening up and mining of appellee's property upon a larger scale than had been done under Ebner's superintendency.

We also call attention to the foregoing evidence as serving to entirely refute the contention of appellant that the posting of the Tripp water location, and the work done by Tripp, were "speculative".

Some time along about the 10th or 15th of August, Mackay left Juneau and returned to Seattle for the

purpose of getting out the lumber and timber for the 200-stamp mill, and Bent was left in charge of appellee's property. When Mackay returned from Seattle, some time in the early part of September, Bent had commenced the work of preparing, clearing off, and grading the flume line for the new flume; and one Black had commenced this work at the old Ebner dam and was extending it down toward the mill site on Cape Horn No. 2 lode claim. Mackay took over the superintendence of the work from Bent, who was acting for Underwood and the California-Nevada Copper Company—that is to say, Mackay was made superintendent of all of the surface ground work, such as building the flume, grading the place for the construction of the 200-stamp mill on Cape Horn No. 2, for which work he had been previously employed by Underwood. Mackay was also to have charge of the underground work and the running of the new tunnel. Bent shortly thereafter left Juneau (Tr. Vol. II, pp. 696-700). Hill & Wettrick pursued their work under their contract with Bent.

2. Any apparent lack of diligence in the operations of appellee was due to the acts of appellant.

Appellant says:

> "The construction of the new Ebner flume carried the water down to a proposed mill site and for a period of over two years was not used for any purpose whatever" (Appellant's Brief, p. 69).

The foregoing statement attacks the diligence of the appellee in the prosecution of its work, looking toward the appropriation of the water of Gold Creek and putting

it to beneficial use. To refute this statement, it would seem sufficient to call the court's attention to Finding of Fact VII of the trial court (Tr. Vol. VII, p. 2659), a portion of which is as follows:

> "That work was commenced under said Tripp notice and those for whom said water was located, and their successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use."

However, it does appear that there was a short time, during the progress of the work of appellee, in which there was a lull in its activities. This was made an issue under the pleadings, and the explanation which appellee gave was satisfactory to the trial court, and it made the above finding after hearing all the proof pertaining to this matter.

The reason for the lull in the work, which was being carried on by Mackay is readily explained. The explanation places the blame for it at the door of appellant.

The Ebner high line flume was, according to the evidence and the findings of the trial court, completed in the fall of 1910. It commenced at the old Ebner dam and extended down to Shady Bend, or the mill site, and was over 4,000 feet long. In December, 1910, Mackay commenced the driving of the new working tunnel and in October, 1911, had it completed for a distance of 1,185 feet. There was not much else done by Mackay until May or June, 1913, on the appellee's property, except the assessment work on the unpatented property,

and the keeping in repair of the improvements which had been placed thereon, Mackay at all times retaining possession of the property. It is an undisputed fact that, through certain proceedings had in the United States District Court for the Southern District of New York, receivers were appointed for the Alaska-Ebner Gold Mines Company in April, 1912. The name of the California-Nevada Copper Company had been changed to the Alaska-Ebner Gold Mines Company, and the latter company was at the time of the appointment of the receivers the holder of all the shares of stock of the appellee, or became the owner and holder thereof shortly thereafter. In April, 1912, Mackay was, by the District Court at Juneau, appointed temporary receiver of all the physical property of appellee and retained possession of the same. On the 29th day of June, 1912, by an order of the same court, in the case of Valdemar T. Hammer, plaintiff, v. Alaska-Ebner Gold Mines Company and the appellee, defendants, Mackay was appointed receiver, ancillary to the New York receivers, and in July, 1912, entered upon the duties as such receiver, and remained in charge of all the physical property of appellee. These facts are alleged in paragraph IV of the complaint (Tr. Vol. I, p. 3), and they are admitted by the answer (Tr. Vol. I, p. 28).

As Mackay stopped work on the appellee's property in October, 1911, and the receivers were appointed for the Alaska-Ebner Gold Mines Company, the owner of the stock of appellee in April, 1912, there was only a short period of about five months in which the work was closed down.

3. The appointment of the receivers of the property of appellee and the closing down of the work thereon was due to appellant.

In proof of the fact that the appointment of the receivers of the property of appellee and the closing down of the work thereon was due to appellant, we refer the court to some undisputed testimony concerning a number of instances of annoyances and obstacles placed by appellant in the way of the progress of the work under Mackay, to some vexatious law suits brought by appellant, to actions which appellee had to bring to protect its rights, and to instances of "jumping" of the patented property of appellee by appellant. All of these things caused the cessation of active operations by the appellee.

Mackay stated that, in the conduct of his work, he had to buy lumber, and that he ordered lumber from the saw mill on Douglas Island near Juneau, and that the same was already sawed, but it was afterwards taken from him by Bradley, president of appellant; and Mackay was put to the trouble of scouring the country for lumber. He further stated that

> "it was pretty hard to raise money back there (meaning back East) we found out; so much litigation was brought against the Company and jumping of the claims, and it was pretty well known in New York where they were getting the money"

—that appellant was causing the trouble (Tr. Vol. III, pp. 1188, 1189).

George Noble stated that the first he had to do with any property of appellee was in 1910, that he was in

Alaska at that time, and was a bondholder of The Alaska-Ebner Gold Mines Company, owner of the capital stock of appellee; that he was soliciting money to carry through the plans to build a 200-stamp mill on the appellee's mine; that he had heard the testimony on the trial of the case at bar, and the plans of opening up and developing the Ebner mines as testified to by witnesses were the plans to which he had reference in his testimony, that he was a bondholder under the mortgage which Mr. Hellenthal offered in evidence in this case (Tr. Vol. IV, p. 1277). (The mortgage referred to is that of the California-Nevada Copper Company to the Standard Trust Company.) He further testified that he first came to Juneau in 1912; that when he came there he was representing a majority of the bondholders of the Alaska-Ebner Gold Mines Company, or what was formerly known as California-Nevada Copper Company; that his object was to ascertain the true situation of affairs; that he had been informed, before he left the East, that there was pending or threatened litigation against the property of the appellee; that he remained in Juneau until about August 10, 1912, and went thoroughly over the situation with Mr. Winn and Mr. Tripp (Tr. Vol. IV, p. 1278); that the property was then in the hands of Mackay as receiver and that he was acquainted with the manner of raising money to carry on the work on the Ebner property (Tr. Vol. IV, p. 1279); that up to May, 1913, he had been connected with the Alaska-Ebner Gold Mines Company (formerly the California-Nevada Copper Company), and with the officers of that company, both in Juneau and in the East; that

he learned about the title and the number of suits which had been commenced or were threatened, and found out that some parts of the property (meaning appellee's property) were in controversy between the Ebner Company (appellee) and the Alaska Juneau Company (appellant) (Tr. Vol. IV, p. 1281); and that these matters were decided obstacles in the way of raising money (Tr. Vol. IV, p. 1282). He stated further:

> "At that time, or at practically all of the times since we have been raising money for this project, we have been confronted by all of our prospective purchasers with the question of title, or of lawsuits that were pending in Juneau with relation to water rights, and with relation to patented claims, which had been brought to our attention most forcibly; I remember a large banking house, Barauch Brothers, with whom I was in direct communication, and then another, Harley Larned of New York—in all instances it has been largely discussed there, particularly through banking circles, and it certainly interfered with the obtaining of money" (Tr. Vol. IV, p. 1282).

John R. Winn, an attorney at law, was called on behalf of appellee; his testimony covers from page 1218 to 1275 of Volume IV of the record. A large portion of it is directed toward the trouble, lawsuits, litigation, and the clouding of the title to the property of appellee by appellant during the time of the progress of the work. He showed that the names and titles of the cases brought in the District Court for the District of Alaska, at Juneau, between the two companies, appellant and appellee, concerning the property of appellee, are as follows:

No. 803, Ebner Gold Mining Company against The Alaska-Juneau Gold Mining Company;

No. 804, Tripp against The Alaska-Juneau Gold Mining Company;

No. 812, The Alaska-Juneau Gold Mining Company against Angus Mackay, et al.;

No. 823, The Alaska-Juneau Gold Mining Company against the California-Nevada Copper Company and the Ebner Gold Mining Company;

No. 826, The Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company;

No. 828, The Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company, et al.;

No. 835, the appealed case, and is the Ebner Gold Mining Company against The Alaska-Juneau Gold Mining Company;

No. 938, The Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company;

No. 939, The Alaska-Juneau Gold Mining Company against the Ebner Gold Mining Company (Tr. Vol. IV, p. 1254).

The witness further testified, in substance:

I was dealing with the people back there (meaning New York) who were interested in it and who were raising the money. It was by reason of the conditions of the property that I went back to New York and while back there ascertained that these law suits prevented the raising of the money to carry on the work (Tr. Vol. IV, p. 1226). Money was sloughing off and he (referring to Mackay) was working with a small crew of men after the 1st of January, 1911, and he was experiencing difficulties in meeting his payrolls (Tr. Vol. IV, p. 1244).

In March, 1911, I went to Boston to see if we couldn't convince these people that these law suits were not so serious, nothing to be scary over, and their whole remark was that they wouldn't have anything to do with it. They were trying to

> sell bonds of the California-Nevada Copper Company. Some were sold. They sent for me to go back there in March, 1911, to see if I could not convince these people there that these suits were not so scary as the news had been circulated; we had meetings with prospective buyers, and with parties who wanted to know whether the suits were real or not. You cannot go on the market and get money when there is a scare on (Tr. Vol. IV, p. 1245).

He added that it was both litigation and the clouding of the title that caused the trouble. Claims had been filed over the property of appellee and they clouded the title and, of course, it was a difficult matter to raise money when the title was clouded and suits were pending (Tr. Vol. IV, pp. 1273, 1274).

We have not burdened the court with giving the nature of these several suits or the subject matter of the litigation. We desire, however, to call attention to one case in particular, which was more instrumental in preventing the raising of money to proceed with Mackay's work, than perhaps all the other suits combined. The case is No. 835a of the District Court of Alaska. The entire proceedings in that case are set up in the reply of the appellant, commencing at page 62 of Volume I of the Transcript. This suit was brought by the appellee to eject the appellant from the Lotta and Parish lode claims, constituting a part of appellee's property. The appellant claimed the same property under a lode location, under the name of "Oregon", made by J. P. Corbus in 1899, the same property having been relocated for appellant by one Datson on July 20, 1910; and under another

claim called the Canyon, located for appellant in October, 1910.

Bradley, the president of appellant, testified that he knew that his company had forfeited the Oregon lode claim, as located by Corbus in 1899, but that it was relocated for appellant by Datson on July 20, 1910 (Tr. Vol. I, pp. 371, 372, 373). In other words, appellant had forfeited the Corbus location by failure to keep up the assessment work and relocated it again July 20, 1910.

The Oregon claim and the Canyon claim overlapped or covered almost all of the surface ground of the Parish No. 2 and the Lotta claim of appellee (Tr. Vol. III, pp. 1062, 1063). Upon the trial of Cause 835a, the lower court decided that the Oregon claim was located by appellant for convenience sake, and that the discovery on the Canyon claim was made on the Lotta claim, and hence both locations were invalid. But the clouding of the title to the property of appellee by these two claims absolutely put an end to the raising of money by Mackay, and hence caused the delay in the progress of the work of appellee, which was not resumed until May or June of 1913. The court below found that, under these circumstances, appellee had prosecuted its work with diligence. And, we submit, no showing has been made which would warrant this court in disturbing that finding.

Sixth.

THE RESUMPTION OF THE WORK BY MUIR AND MACKAY.

The work to carry out the plans of opening up and mining the property on a larger scale was resumed by Mackay in May or June, 1913.

Regarding the installation of the new air compressor at Shady Bend, near the portal of the new tunnel, Mackay testified that the capacity of the compressor is 1950 cubic feet of air per minute; *that he commenced the installation and erection of the same on the property in May or June of 1913, and in August, 1913, the water was applied through the new high line flume for driving or running of the compressor* (Tr. Vol. II, pp. 705, 706). This testimony shows the inaccuracy of the statement of appellant (Brief, p. 15) that the water was first applied on December 17, 1913.

The circumstances, under which the resumption of work took place, were as follows: The California-Nevada Copper Company, afterwards known as The Alaska-Ebner Gold Mines Company, had given a mortgage to the Standard Trust Company of New York and Edward M. F. Miller. All of the shares of stock of the appellee were afterwards bought by the copper company, and, by reason of a clause in the mortgage as heretofore mentioned, became subject to the terms of the mortgage given to the trust company. There was a foreclosure of the mortgage and the stock of the appellee was sold (Tr. Vol. IV, pp. 1228, 1229, 1230). This stock was bought in by one Chapman and his associates (Tr. Vol. IV, p. 1229).

The testimony of John R. Winn shows that Chapman and his associates, or the "Chapman Committee on Reorganization", was raising money in New York through the Smelting Company (meaning the United States Smelting, Refining & Mining Exploration Company) (Tr. Vol. IV, p. 1236 and p. 1240).

It appears from the testimony of Downie D. Muir that the United States Smelting, Refining and Mining Exploration Company obtained an option on the Ebner property (meaning the shares of stock of appellee) from the "Chapman Committee" of New York or Boston, which purchased the property at the foreclosure sale early in the spring of 1913 (Tr. Vol. III, p. 1164).

Of course, the only property which was sold under the foreclosure of the mortgage were the shares of stock of the appellee, as the California-Nevada Copper Company had mortgaged the same to the Standard Trust Company (Tr. Vol. IV, p. 1230).

Muir was the agent and representative of the United States Smelting, Refining and Mining Exploration Company, and was first in Juneau in 1911, but had nothing to do with the appellee's property until in July, 1913. He went upon the property at that time at Shady Bend, and he testified that the new air compressor had then been installed and the compressor house built near the mouth of the tunnel. From that time on, until the trial of the case, Muir was connected with and represented his company, and he and Mackay carried on the work on appellee's property (Mackay then being receiver) from the 28th day of July, 1913, to the time of the trial of the case, and Muir was continuing it at that

time (Tr. Vol. III, pp. 1130, 1131). The money for the work was furnished by the United States Smelting, Refining and Mining Exploration Company, the optionee of all of the shares of stock of appellee.

At the time Muir commenced work with Mackay, in July, 1913, there had been driven 1173 feet of tunnel. In August, 1913, the water through the new flume was applied to the air compressor, and the power for driving the new tunnel and ventilating it was generated at the new air compressor plant, at Shady Bend on the Cape Horn No. 2 claim. Up to the time of the trial, Muir had done underground work in the way of drifts, tunnelling, crosscuts and raises, to the extent of 4,400 feet in addition to what Mackay had done, and the work was going on with about 100 men (Tr. Vol. III, pp. 1131, 1132, 1133).

Muir further testified that, within a year from the time of the trial, the appellee would need the water to the full capacity of the new flume and that eventually it would need more water than the flume carried (Tr. Vol. III, p. 1134).

Shortly after July, 1913, after Muir had commenced the work with Mackay, a 5-stamp mill was erected at Shady Bend; it is marked "Mill" on defendant's exhibit "S". The 5-stamp mill was erected for experimental purposes to sample the ore taken from the mine. The reason they had not erected a larger stamp mill, prior to the trial of this case, was that it was impossible in the few months' time to arrive at any conclusion, mineralogically or otherwise, on the ore which they had

developed. Muir stated upon his examination that they had not arrived at the stage, to know what size stamp mill or what kind of machinery they would need in handling the ore bodies on the property. The witness then explained the kind of ore bodies, which had been discovered and developed (Tr. Vol. III, pp. 1136, 1137).

Ebner, testifying on this same subject, stated that, after he had made a full examination of the property, just prior to the trial, he found that the ore bodies had been developed to such an extent that it would justify the erection of a mill of a capacity sufficient to handle 1000 tons of ore per day (Tr. Vol. III, p. 1128).

It appears from the record that the appellee used the water continuously through its new flume from August, 1913, until January, 1914, and applied it to the air compressor, ventilation of the mine, and to such other purposes as were necessary in the progress of the work. It had, however, not used the water to the full capacity of its flume at any time, for the reason that the development of its work up to the time of the trial of the case, as testified to by Mr. Muir, had not justified the use of that amount of water. But in January, 1914, by reason of cold weather, the water had become low in Gold Creek, and at that time appellee was using all of the water obtainable at its intake at the Ebner dam, and it was at this time that appellant brought this suit. The appellee's work had progressed from time to time and it had, as the necessity arose, taken additional amounts of water out of Gold Creek; it had carried on all of the improvements, and had done all of the work, which has been testified to in this case; and yet, while

appellant knew very well that in cold weather there would be a shortage of water, it stood by, saw these improvements made at an expenditure of large amounts of money by appellee, and made no protest or complaint. It surely, under this showing, is in no position to seek relief in a court of equity.

See:

Cobb v. Smith, 16 Wis. 692;
Wood v. Railroad Co., 68 Ga. 539;
Pomeroy's Eq. Jur., Vol. II, sec. 817.

From the foregoing, we submit, that it abundantly appears that the trial court was fully justified in its finding that appellee had at all times prosecuted its work with diligence.

Thus far we have shown:

(a) That William M. Ebner in 1908 sold all of his shares of stock in appellee, which was a large majority, to Underwood; that Ebner had theretofore been president, superintendent and general manager of all the property of appellee, and that Underwood virtually stepped into Ebner's shoes and commenced directing the affairs of appellee;

(b) That the California-Nevada Copper Company, afterwards called The Alaska-Ebner Gold Mines Company, bought out or succeeded to Underwood's interest in the shares of stock of appellee, which had been transferred to him by Ebner, and that the California-Nevada Copper Company eventually became owner of all of the stock of appellee;

(c) That the California-Nevada Copper Company mortgaged all of the shares of stock of appellee to the Standard Trust Company of New York and Edward M. F. Miller, trustees, and that there was a foreclosure of this mortgage by the Trust Company, and all of the shares of stock of the appellee were purchased by one Chapman, or the Chapman committee;

(d) That Tripp was employed by Underwood and his successor, the California-Nevada Copper Company, after Underwood and the latter company had become the owner of the large majority of the shares of stock of appellee, and that Tripp was sent upon the property of appellee to ascertain and submit plans for the opening up and working of its property, on a larger scale than it had theretofore been operated; that Tripp finally decided upon the method of opening up and working the property which had theretofore been adopted by Ebner, and that, at the time that Tripp posted his water location notice, the appellee was the owner of all of the property necessary for the contemplated project and that Tripp commenced the work of carrying out this project;

(e) That Tripp quit the service of his employer in August, 1910, and Mackay was employed by Underwood and the California-Nevada Copper Company to proceed with the work, which had been commenced by Tripp; and that Mackay pursued this work with diligence and had possession of the property of appellee, from the time that he commenced his services in 1910, down to the trial of this case;

(f) That Downie D. Muir, representing the United States Smelting, Refining and Mining Exploration Company, (which said company was the optionee of all of the shares of stock of appellee), in 1913, together with Mackay, pursued this same work, which had been originally planned by Ebner, commenced by Tripp and followed by Mackay, down to the time of the trial of this case; and that all of the work, looking toward the appropriation and application of the water of Gold Creek to mining and milling purposes, was done under the Tripp notice.

Seventh.

THE APPELLANT COMMITTED A TRESPASS WHEN IT POSTED THE MULLIGAN NOTICE AND CONSTRUCTED ITS DAM ON THE LOTTA PATENTED CLAIM OF APPELLEE AND NO RIGHTS WERE INITIATED THEREUNDER. ANY WORK CLAIMED TO HAVE BEEN DONE UNDER MULLIGAN'S LOCATION NOTICE WAS OF NO FORCE OR EFFECT AND COULD NOT AFFECT THE RIGHTS OF APPELLEE.

It is the contention of the appellee that appellant committed a trespass upon the property of the appellee when it posted the Mulligan notice and constructed its dam on the Lotta patented claim of the appellee and that no rights in its favor were thereby initiated.

The trespass by appellant upon the property of appellee was made an issue by the pleadings, and a large amount of evidence was offered thereon by both parties. We have divided the subject into several parts, to which we respectfully ask the court's attention.

1. The court below determined that the acts of appellant constituted trespass.

While there may not be any specific findings of the trial court upon this trespass issue, yet we submit, the general findings, conclusions and decree of the lower court are broad enough to cover this matter.

Conclusion No. 1 of the trial court is:

> "That as against the plaintiff (appellant) the defendant (appellee) is the owner of and entitled to the first use of 10,000 miners' inches of water to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted" (Tr. Vol. VII, p. 2674).

Conclusion III of the trial court is as follows:

> "That the plaintiff (appellant) is not entitled to the relief asked for or to any relief" (Tr. Vol. VII, p. 2676).

The decree of the trial court is found in Volume VII of the record, at pages 2678 and 2679. The decree adjudges:

> "1. That the plaintiff (appellant) herein take nothing by reason of its complaint;
>
> 2. As against the plaintiff herein (appellant) the defendant, the Ebner-Gold Mining Company (appellee) is entitled to the first and paramount use of the water of Gold Creek to the extent of 10,000 miners' inches of water, if so much be in said creek, and be useful or necessary for defendant's use or uses for mining and milling purposes, or any other beneficial purpose; to be taken from the said creek where said defendant's (appellee's) dam is constructed, to wit: near the lower boundary line of and on defendant's (appellee's) patented lode claim known as the 'Golden Fleece' * * * "

In other words, the trial court has decided all of the issues raised by the pleadings in favor of appellee. From the foregoing conclusions and decree, we contend, it necessarily follows, that the court below impliedly, at any rate, determined that the posting of the Mulligan notice on the Lotta claim and the building of the dam, in the first instance, upon that claim by appellant, were trespasses, and that no rights in its favor were initiated thereby. The conclusions and decree of the court below deny the efficacy of each and every step which appellant took looking toward the appropriation of the water of Gold Creek to beneficial use. Each and all of these steps, taken by appellant, to establish its asserted rights, are set up in appellant's complaint and reply, and the trial court concludes:

> *"That the plaintiff (appellant) is not entitled to the relief asked for or to any relief."*

Further—

> "That the plaintiff (appellant) herein take nothing by reason of its complaint."

This is tantamount to a general finding against any and all claims made by appellant to the water of Gold Creek.

2. The evidence conclusively shows that appellant's claim under the Mulligan notice is founded upon trespass.

Irrespective, however, of the correctness of our contention regarding the effect of the conclusions, findings and decree of the trial court, the evidence, we think, compels the conclusion that the appellant, in making its

attempted appropriation of the water of Gold Creek, was a trespasser.

Appellant states in its brief, with regard to its action in posting the Mulligan notice on the patented Lotta claim:

> "The most that can be made of it is that a mistake was made owing to the confusion and uncertainty at the time the notice was posted, and through an inadvertence the precise place where the notice was posted turned out to be on the 'Lotta' patented claim. No claim of right was asserted to the land on which the notice was posted" (Brief, p. 50).

This comment can avail appellant nothing, because the very matter here under discussion had been adjudicated between appellant and appellee in a prior case, wherein it was determined, by both this court and the trial court, that the entrance upon the Lotta patented claim by appellant, for the purpose of appropriating the waters of Gold Creek, was wrongful and constituted a wilful trespass.

Appellant set up in its reply the findings of fact, conclusions of law and judgment in Cause No. 835a, wherein the appellee in this case was plaintiff, and the appellant was defendant (Tr. Vol. I, p. 62). That case has been heretofore mentioned; it was a suit in ejectment for the recovery of possession by appellee of the patented Lotta lode mining claim, and Parish No. 2 unpatented lode claim (Tr. Vol. I, p. 62). The appellant filed its answer in No. 835a, and averred that it was the owner of a mining claim located by one J. P. Corbus in the month of October, 1899, known as the Oregon mining

claim; also that it was the owner of a lode mining claim, located July 20, 1910, by one R. G. Datson, which lode claim was likewise designated and named the Oregon lode mining claim; and further, that it was the owner of another mining claim known as the Canyon vein or lode claim, located by one W. R. Lindsey on the 8th day of October, 1910. Appellant also alleged in this answer that the work, which it was doing on the ground, then in its possession, was within the boundary lines of the Oregon and Canyon lode claims. At that time, appellant was building its flume line over the Parish No. 2, and its dam upon the Lotta, claiming the right to enter thereon by reason of the Mulligan notice and of its asserted ownership of the foregoing Oregon and Canyon claims. It has also been shown by Wettrick's testimony that the Corbus Oregon claim and the Datson Oregon claim, above referred to, covered practically the same ground and lapped over on to the Lotta patented claim, and that the Canyon lode claim, located by Lindsey, also took up the greater portion of the Lotta and some portions of the Parish No. 2 (Tr. Vol. III, pp. 1062, 1063, and exhibit, Tr. Vol. VI, p. 2220). (See, also, Kinzie's testimony, that the two Oregon claims are the same, Tr. Vol. I, p. 312.)

We further call to the court's attention that the location of the Oregon claim by Datson was made on July 20, 1910, and the Mulligan notice was posted on August 1, 1910, and the place, where the Mulligan notice was posted, was on what the appellant asserted to be its Oregon lode claim; hence, *at the time of the posting of the Mulligan notice, the appellant was claiming an*

interest in the land or ground of the Lotta claim, and this, under all the authorities, made the entry of the appellant upon the Lotta claim and the posting of the Mulligan notice thereon, a trespass.

In Cause No. 835a, the trial court made the following finding, regarding the Lotta lode claim:

> "That while plaintiff (appellee here) was the owner of such mining claim ("Lotta") and seized and possessed thereof, the defendant (appellant here), early in August, 1910, without right or title, entered into possession of part of said Lotta mining claim and without right or title thereafter constructed thereon a portion of a certain dam, with structures accessory thereto, for the purpose of diverting the waters of Gold Creek flowing in, through and over said Lotta lode mining claim, and ousted and ejected plaintiff therefrom, and now wrongfully and unlawfully withholds the possession thereof from the plaintiff (appellee)" (Tr. Vol. I, p. 123).

The court further found in that case:

> "The court further finds that the Oregon mining claims referred to in defendant's answer as located by J. P. Corbus and the Oregon mining claim as located by R. G. Datson were each made solely for the purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the defendant or its grantors, or at all, on either of said claims, nor any indication or evidence of such as would warrant or justify one in spending time, work or money in the development of either of such claims or with the expectation of finding ore" (Tr. Vol. I, p. 126).

The court concluded in that case:

> "1. That the plaintiff (appellee) is entitled to the possession of the Lotta mining claim and is the

owner thereof as staked upon the ground and described in plaintiff's (appellee's) amended complaint, and is entitled to a decree ousting the defendant (appellant) therefrom.

"2. That the plaintiff (appellee) is entitled to a writ of restitution and a writ of ejectment herein restoring the plaintiff (appellee) to the possession of the Lotta patented claim as more particularly set out in the findings of fact herein * * *" (Tr. Vol. I, p 126).

With respect to the Canyon claim, the court in that case made a finding as follows:

"The court further finds that the Canyon mining claim is based upon a discovery within the boundary of the Lotta patented mining claim above described, and that said location is void and without effect."

A decree was entered in that cause accordingly, as will appear from appellant's reply in the case at bar (Tr. Vol. I, p. 128). That case was afterwards appealed to this court and the judgment of the lower court affirmed (210 Fed. 599).

Under the proceedings above set forth, the appellant in this case was adjudged to be a trespasser *when it entered upon the Lotta patented claim, either to post the Mulligan notice or to build its dam.* And the judgment in the former case is, admittedly, *res adjudicata* in this case.

That the rights claimed by appellant under the Mulligan notice, contemplated a trespass in the attempted exercise of them appears from the face of the notice. In that notice, appellant claimed the right to *build a flume or ditch over the Lotta claim.* A portion of

the Mulligan notice, which was posted on the Lotta claim, reads as follows:

> *"Said water to be diverted from said creek at a point indicated by this notice posted on a tree and about one mile from the mouth of the said Gold Creek; said water is to be diverted by ditch, pipe or flume"* (Tr. Vol. V, p. 1959).

Thus, the appellant was claiming an easement over the Lotta patented claim and a sufficient amount of the surface ground thereof for a ditch or a flume.

The witness Wettrick stated that the appellant also had put some troughs or small pieces of flume upon the Lotta claim, just below where the Mulligan notice was posted. This clearly showed the intention of the appellant to cross the Lotta claim with its flume, pipe or ditch line and to thereby commit a trespass thereon (Tr. Vol. II, p. 649).

3. Appellant, at the time the Mulligan notice was posted, well knew that it was committing trespass.

It cannot be disputed, we think, that the trespass of appellant could initiate no rights on its part, even if it was done under a mistake. But the evidence conclusively shows that the trespass was knowingly and wilfully committed.

Bradley, the president of the appellant, testified that, in the year 1910, he went to Juneau just a little in advance of what has been referred to in this brief as the "Bent" party, and that he knew what Bent and his people were going to do on the property of appellee (Tr. Vol. I, p. 375). Bradley claimed that he arrived in Juneau some time in July, and that he discovered

that the Oregon claim, above referred to, as located by Corbus in 1899, had been forfeited by reason of the non-performance of the necessary annual assessment work (Tr. Vol. I, pp. 371, 372, 373); that he then had Datson go and relocate the Oregon claim on July 20, 1910, for the appellant, after it had allowed the same to be forfeited and to revert to the Government under the Corbus location. Then, presumably, becoming uneasy about the legality of the Oregon location, in October, 1910, he caused the location of the Canyon claim to be made.

Again, to show that the appellant had for a long time known the boundaries of the Lotta lode claim, we direct attention to appellant's exhibit No. 38, found at page 2003, Vol. V of the record, which is a report on appellee's property. This report was brought to the notice of McDonald, who was then the superintendent of the Treadwell Gold Mining Company, as well as of the appellant. He was acting for Bradley, who was at that time and now is the president of the appellant. There was an examination made of this property by McDonald, as the representative of Bradley (Tr. Vol. IV, p. 1628), and Bradley and Kinzie examined the property of appellee. The date of this report is June 1, 1901. Under the heading of "Property", in this instrument, it is stated that the property consists of seven patented lode claims, two unpatented lode claims, and one unpatented placer claim. It has been shown, and is conceded, that the patented property that belonged to the appellee, as far back and prior to 1901, the

date of the above report, consisted of the Lotta and several other claims, making up the seven.

On page 2007 of Vol. V of the record there is a paragraph in this report as follows:

> *"The title to all the water running in Gold Creek is absolutely vested in this company (meaning appellee). The quantity of the water for eight months in the year is at least 4,000 miners' inches. The lowest stage of water in the last six years at any time during the coldest weather has been 740 miners' inches."*

This report, therefore, conveyed absolute notice to appellant that appellee was claiming all the water of Gold Creek for mining and milling purposes as far back as 1901, the date of the report.

To show that appellant as far back as 1909, while Tripp was working for appellee, knew of the boundary line of the Lotta and Parish Nos. 1 and 2 claims, we call attention to a deed made by appellant to appellee conveying to appellee all that part of the Colorado patented claim which was in conflict with the Parish No. 1 unpatented claim of appellee (see Deed, Tr. Vol. VI, p. 2298).

Surely, it is not reasonable to suppose that leading mining men like Bradley, McDonald and Kinzie would take an option upon mining property and examine the same to ascertain its value, without knowing its boundary lines. The irresistible conclusion is that all of the representatives and agents of appellant knew of the boundary lines of the Lotta claim as far back as 1901. Appellant, however, to relieve itself from the charge

that it was a wilful trespasser, now says that the lower boundary was confused and uncertain.

But, we invite the court's attention to the following evidence to show that the boundary lines of the Lotta claim, and especially the lower side line, had at all times been kept cleared out, and the monuments retained thereon, and that appellant undoubtedly knew that it was trespassing upon the Lotta claim.

Ebner states that he had the side line of the Lotta claim brushed out in 1893 (Tr. Vol. III, p. 1098); at that time he saw the corner posts and monuments, and he pointed them out on appellee's exhibit "S"; he remembered that the posts were marked "Survey No. 87", which is the number of the survey of the Lotta claim (Tr. Vol. III, p. 1099). He further testified about keeping this lower side line of the Lotta brushed out and maintaining the monuments thereon down to 1908, when he sold out. In 1908 he was on this property with Hill & Wettrick, and had the lower side line of the Lotta brushed out at that time (Tr. Vol. III, p. 1102). He also saw the same corner posts and monuments there in 1908.

Several exhibits were identified by the witness as being photographs of the corner posts that were there in 1908; these exhibits were offered in evidence, and are in the record. The witness further stated that he was upon this property again in 1910 and saw the stakes and monuments on the ground, which had always been there (Tr. Vol. III, pp. 1106-7).

The witness Wettrick pointed out the corner posts which were on the property in 1908 and marked them on appellee's exhibit "S" by a red circle (Tr. Vol. II, pp. 603-4); and he knew about the brushing out of the lower side line of the Lotta in 1908 by Ebner, and described the thorough manner in which it was done (Tr. Vol. II, p. 613). He stated that the corner posts which he found there were the same as testified to by Ebner (Tr. Vol. II, p. 614). Wettrick was on the premises again in 1910 and noticed that the lower side line of the Lotta claim could very easily be seen and was very easily discernible by reason of having been cleared in 1908 (Tr. Vol. II, pp. 615, 616); he set the stakes, under the decision of Judge Cushman, in exactly the same place where they had always been (Tr. Vol. II, p. 617). In reply to questions by the trial court the witness (Tr. Vol. III, p. 1175) testified that in the trial of Cause No. 835a, Judge Cushman placed the lower side line of the Lotta claim just where appellee has always contended it was, according to the stakes and monuments above referred to, and along the lines where it has been brushed out, as testified to by the witnesses above mentioned.

Oscar Harri, the keeper of appellee's property, and who resided on the property at the old mill, from the time that Ebner sold out, in 1908, until Tripp took possession of the property, and who, for many years past, had been in the employ of Ebner and knew the boundaries of the property, stated that this lower side line of the Lotta had always been kept brushed out and was plain to be seen (Tr. Vol. III, pp. 839, 843).

Tripp also corroborated the testimony of the other witnesses who testified on this subject (Tr. Vol. II, p. 517).

It thus is made clear by the evidence that appellant must have well known that its attempt to appropriate the waters of Gold Creek on the Lotta claim was a trespass. But, we submit, even if it had made an honest mistake in seeking to appropriate the water of Gold Creek by entering upon the Lotta claim it nevertheless committed a trespass under which no rights could accrue to it.

4. The work done by appellant, and upon which it predicates its asserted right to the waters of Gold Creek, was done upon appellee's property, and was a trespass.

It is claimed by appellant that it commenced building its dam on the 3rd day of October, 1910, and that appellee's employees rolled rocks down and broke out a temporary dam which was put in on that date, and that appellant had some of the employees of appellee arrested. It may be true that some of the over-zealous employees of appellee may have gone a little too far in protecting its property by resisting invaders and trespassers, who were determined to go on the Lotta claim and erect a dam, and were arrested. But, it is also shown in the evidence that, while these employees of appellee were under arrest, and in the nighttime on the 3rd of October, 1910, the so-called temporary dam of the appellant was put in the creek.

In connection with this matter, we call attention to some further testimony upon this invasion by appellant of the rights of appellee.

Fred Radel testified that he helped to build a fence some time in September, 1910, prior to this invasion of the appellant, and that this fence was built across a road, which led from the regular traveled Basin road to the air compressor of appellee, on the Lotta claim; that there was placed upon that fence a trespass notice warning people to keep off of the property of appellee; that this notice was there on October 3rd, when appellant undertook to put in the temporary dam (Tr. Vol. II, pp. 582, 583). The testimony of Radel is corroborated by that of Mackay, Wettrick and other witnesses.

The witness further testified that after the fence was built he was up there and saw three or four men coming through the brush; that he had had orders from Mackay, if anyone came on the property to report it; this the witness did, and he also reported it to Black, who was foreman of appellee. Black and the witness then went up to investigate, and Hunsaker went down by the compressor (meaning appellee's compressor on the Lotta claim), and there were three men (employees of appellant) working there. Hunsaker told them that they were on patented ground, and that they would have to leave. One of the men ordered off was Henderson, one of the foremen of the appellant (Tr. Vol. II, p. 584).

It is a conceded fact in the case, that the point where the appellee undertook to put in a piece of flume and to build a dam on October 3, 1910, was just below the fence that Radel had built and on which was posted the foregoing trespass notice.

The appellant claims (Brief, p. 9) that,

> "On October 3rd, 1910, the Alaska-Juneau dam was completed, flume started, and the water turned in.
>
> "On the night of October 3rd the flume was crushed by blasting and rolling down rocks and blasting was continued on October 4th."

But, this dam was placed upon appellee's property; it was put there on October 3, 1910, at the time that Al. Black and Mackay and some others were arrested. Upon this subject we call attention to the following testimony:

John Carlson stated that he was employed by Mackay, and that on the 3rd day of October he was running an open cut on the Lotta claim; that on the same day he saw the Alaska-Juneau people (appellant) working down in the creek *above where they afterwards built their dam* (Tr. Vol. II, pp. 738, 739); that this work which was being done at that time, was above the dam, as it was constructed at the time that the case was tried before Judge Cushman in May, 1911 (Tr. Vol. II, p. 740); that, at this time, appellant put a box in the creek, about 3 x 4 and about 14 feet long, about fifty feet above where the present dam is; the box was sunk into the water and the water went into one end of the flume, in the bed of the creek, and came out the other end of the flume, in the bed of the creek (Tr. Vol. II, p. 741). The witness further stated that the dam, which the appellant claimed it had built on the 3rd of October, 1910, consisted of two logs or poles, placed across the creek for foot logs (Tr. Vol. II, p. 755); and that these logs

were above where the dam was afterwards constructed, on the property of appellee (Tr. Vol. II, pp. 754, 755).

Al. Graham, another witness, testified that he was doing assessment work on the Parish No. 2 lode claim on the 3rd day of October, 1910, and corroborates the testimony of the witness Carlson (Tr. Vol. II. pp. 774-780).

Al. Black corroborates Graham and Carlson (Tr. Vol. III, pp. 801, 802; also, p. 813).

Dan Riordan, with respect to this subject, corroborates the witnesses Carlson, Black and Graham (Tr. Vol. III, p. 821).

It has been shown conclusively that on June 11, 1911, when Judge Cushman tried Cause No. 835a, the dam had been constructed to a large extent upon the Lotta claim and was diverting water from that claim to appellant's flume. It also appears that, all of the work which had been done by appellant on October 3, 1910, in the bed of Gold Creek, was above where the dam was constructed, and on the Lotta claim. This, then, was a forcible entry upon the land of appellee and a wilful trespass, and the work done gave appellant no rights to the waters of Gold Creek.

The work consisted of putting two or three poles across the creek, to be used as foot logs, and the floating of a piece of flume in the bed of the creek, above the present dam, and, as above stated, letting the water run through one end of the flume in the bed of the creek and out the other end of the flume in the bed of the creek. This is what appellant refers to in its brief,

on page 9, as its dam that was constructed on October 3, 1910. But Judge Lindley, in his oral argument, did not seriously insist that the term "dam" could be applied to these two logs thrown into the creek.

It was out of this work, which appellant was doing and which appellee resisted, that an arrest was made of Mackay, appellee's superintendent of the work, and Al. Black, its foreman. Al. Black states in his testimony (Tr. Vol. III, p. 811), that this box was put in the creek by appellant and the work was done there, while they were under arrest. They were arrested for trying to prevent appellant's employees from doing work on the Lotta claim.

John Carlson testified that he saw the box put in the creek between 8 and 9 o'clock in the evening of October 3, 1910, by employees of appellant and that appellant had a few men working there, but he did not know how many (Tr. Vol. II, p. 756).

At 8 or 9 o'clock in the evening of October 3rd of any year at Juneau it is dark. Hence, it appears that appellant, while it had under arrest appellee's foreman and superintendent of the work, went back in the nighttime and tried to get whatever advantage it could, in the way of pretending to divert the water of Gold Creek upon appellee's land.

5. The work done by appellant on the Parish No. 2 claim gave appellant no rights.

In connection with our contention that the work done by appellant on the Parish No. 2 claim gave it no rights, we again call attention to the status of the rights of

appellant and appellee, to the property embraced in the Lotta patented claim and in the Parish No. 2 lode claim, at the time of the posting of the Mulligan notice on the Lotta claim and of the work done by appellant.

It has been shown that the Lotta patented claim is one of the oldest patented claims in Alaska; that the Parish No. 2 unpatented claim was taken up for appellee, a long time prior to 1910; that appellee had had the same surveyed for patent; that this claim lies alongside the Lotta and they have a common side line, the lower side line of the Lotta being the upper side line of the Parish No. 2 claim.

The Parish No. 2 lode claim was a valid outstanding location or lode claim during the year 1910, at the time that the Mulligan notice was posted and at the time that the appellant was building its flume line across the same. Not until this court's decision in Cause No. 835a, rendered the 5th day of January, 1914 (210 Fed. 599), was appellant in any position to undertake, without the consent of appellee, to go upon the unpatented Parish No. 2 claim. Judge Cushman held that appellee had performed assessment work on the Parish No. 2 claim for the years of 1909 and 1910. This holding was affirmed by this court.

It is a well settled rule that one who has taken up a mining claim, staked it out, properly recorded his notice, and is doing the assessment work upon it, has the same rights to the undisturbed possession of the claim which he would have to a patented claim, as against everyone except the United States. No third person could, therefore, as against the appellee, go upon the

Parish No. 2 claim and initiate any rights thereto, at least not until the decision of this court, in Cause No 835a, on January 5, 1914.

In the case of *Nevada-Sierra Oil Co. v. Home Oil Co.*, 98 Fed. 673, at page 680, it is said:

> "But no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by forcible, fraudulent, surreptitious or clandestine entry thereon."

In *Thallman v. Thomas,* 111 Fed. 278, 279, the court said:

> "A valid claim to unappropriated public land cannot be instituted while it is in the possession of another, nor can such a claim be initiated by forcible or fraudulent entry upon land in possession of one who has no right either to the possession or the title."

See, also,

Belk v. Meagher, 104 U. S. 279;

Cosmos Exploration Co. v. Gray Eagle Oil Co., 104 Fed. 46 (affirmed in 112 Fed. 17);

Empire State Idaho Mining & D. Co. v. Bunker Hill & S. Min. & C. Co., 114 Fed. 419;

Lindley on Mines, Vol. I, sec. 217.

6. Appellant claimed ownership of appellee's property.

Bradley, the president of the appellant, preceding Bent to Juneau, in July, 1910, ascertained that a claim, which his company had located by J. P. Corbus in 1899, known as the Oregon, had been forfeited by the non-performance of assessment work. This claim, as has been shown by the testimony of Wettrick and by the

exhibit referred to herein, as it was located by Corbus, covered a large portion of the Parish No. 2 and of the Lotta claim. Appellant, in 1910, finding its Oregon claim had reverted to the Government, had to make some claim or other to the ground covered by the Lotta, and to a portion of the ground covered by the Parish No. 2, over which to run the water of Gold Creek for its use. On July 20, 1910, appellant therefore directed one Datson to go on the Lotta and Parish No. 2 claims and re-locate for appellant the old Oregon claim, which had been forfeited. Datson did so, and the claim was again named "Oregon".

It has been shown that the exterior boundary lines of these two Oregon claims were practically the same. Then, on August 1, 1910, appellant claims that it had Mulligan post his notice of appropriation. It is conceded by appellant that this notice was posted on the Lotta claim. In its brief, at page 49, referring to the Mulligan notice, appellant says:

> "This notice was posted at a point a short distance north, 150 feet, of where the Alaska-Juneau dam was subsequently constructed. This point was determined by the District Court of Alaska in litigation between these parties to be on the patented 'Lotta' claim belonging to the Ebner Company."

At page 50 of its brief, appellant states, with reference to this matter:

> "The most that can be made of it is that a mistake was made owing to the confusion, * * * This, however, is, we think, quite immaterial. No

claim of right was asserted to the land on which the notice was posted."

But this assertion, that there was a mistake, and that no claim of right was asserted to the land on which the Mulligan notice was posted, is contrary to all the evidence. It has been shown, by the testimony of Wettrick and by the exhibit to which he referred, and to which we have referred in stating the preceding facts, that this Oregon claim, located by Datson for appellant, covered that part of the Lotta claim upon which the Mulligan notice was posted, and that appellant has been strenuously trying, by law suits, to establish its title to all of that portion of the Lotta claim which was embraced within the boundary lines of the Oregon claim. It declared in Suit No. 835a that both the Corbus and the Datson Oregon claims were valid outstanding locations, and up to the trial of that case it was asserting title under these two locations. But the court held that both locations were invalid.

It has further been shown that another claim, called the Canyon, was located for appellant, in October, 1910, over the Lotta claim, and embraced within its boundary lines the place where the Mulligan notice was posted. This claim likewise was decided by the court in No. 835a to be invalid, because the discovery was made on the Lotta claim. Appellant cannot, therefore, support its assertion that *no claim was made by it to the ground upon which Mulligan posted his notice.* This ground was covered by appellant's two claims, Oregon and Canyon.

7. The posting of the Mulligan notice, on the Lotta claim, itself constituted a trespass.

The Mulligan notice contained the clause, "Said water is to be diverted by ditch, pipe and flume". In other words, *appellant was seeking an easement across the patented claim, or seeking to take and occupy so much of the Lotta claim as its ditch, pipe or flume line would occupy.*

Then, too, Wettrick testified, as we have shown, that the defendant put some troughs on the Lotta claim, attempting to take the water off the same.

There can, we submit, be no question that appellant was a wilful trespasser on the property of appellee. This was determined by Judge Cushman in his findings and decision in No. 835a. Furthermore, the testimony clearly shows that the lower side line of the Lotta claim was kept constantly brushed out, and that, prior to 1910, Bradley and his representative McDonald, and Kinzie, all were interested in an option on property of appellee, and examined the same for appellant. Again, in 1909, it has been shown that, while Kinzie was manager of appellant, and Bradley its president, they caused to be deeded to appellee a portion of the Parish No. 1 lode claim, which was in conflict with their Colorado claim. The Parish No. 1 claim lies below the Lotta and Parish No. 2. These men, who were at the head of this mining company, would, certainly, not have thus conveyed away its property, without having carefully ascertained the boundaries of the same and all of the facts connected with it.

Up to June 12, 1911, as has been conclusively shown, the dam of appellant was constructed largely upon the Lotta claim, and was shearing the water from that claim into the intake of appellant's flume. Judge Cushman declared that appellant was a trespasser in this respect, and ejected it from the Lotta claim.

The evidence shows that appellant committed a knowing and continued trespass upon the property of appellee. It had constructed its flume line from the dam on the Lotta claim down to Snowslide Gulch over the Parish No. 2 claim, a distance of between 800 and 1,000 feet, taken the water through it, and applied it to its air compressor there some time in November, 1910. All this time it was a trespasser upon the Lotta claim.

While appellant was thus engaged in the construction of its flume and in the erection of its dam, appellee had warned it to keep off the patented property; it had built a fence and put up a trespass notice and even was obliged to resort to force to keep appellant off its property. Under all these circumstances, we submit, it is not open to doubt that these acts of appellant constituted a knowing and wilful trespass upon the property of the appellee.

8. No rights in favor of appellant can be based upon the acts of trespass committed on appellee's property.

It is a well settled proposition that the right of appropriation extends only to waters upon the public domain of the United States, or upon the public lands of a state, and that one cannot acquire a water right

on land held in private ownership by another, without acquiring an easement on such land.

See:

40 Cyc., 705;
Prentice v. McKay (Mont.), 98 Pac. 1081;
Smith v. Denniff (Mont.), 60 Pac. 398;
Maguire v. Brown, 106 Cal. 660; 39 Pac. 1060;
Lewis on Eminent Domain, sec. 631;
Atherton v. Fowler, 96 U. S. 513.

The attempted location or appropriation of the waters of Gold Creek by the posting of the Mulligan notice being a trespass, and the building of the dam being also a trespass, created no rights in the appellant. The statute of the United States (Rev. Stat. U. S., secs. 2339, 2340), and applicable to Alaska, recognizes the right of an individual to acquire the use of water by appropriation; but, as said by the Supreme Court of Montana, in *Prentice v. McKay,* supra, this statute

> "* * * neither has authorized, nor indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings".

Wiel, in his book on "Water Rights in the Western States", at page 244, Vol. I, concisely states the rule as follows:

> "An appropriation cannot be initiated unlawfully by a trespass upon private land, and no rights can be obtained thereby against the land owner whose land is trespassed upon in any jurisdiction."

The custom of appropriation of water to a beneficial use has been limited, under the Act of Congress, July 26, 1866, to Government lands.

Curtis v. La Grand Water Co. (Ore.), 23 Pac. 808;

Carson v. Gentner (Ore.), 52 Pac. 507.

Farnham, in his book on "Waters", Vol. III, pp. 2049, 2050, section 659, states that the statute of 1866 applies only to public lands; that it has no application to lands of individual owners and confers no right to divert the water of a stream flowing through their land; that it confers no right to enter upon the land in the possession of another, even for the purpose of completing an attempted diversion of water thereon, where the person seeking to enter had, at some previous time, manifested his intention to secure a water right thereon.

Referring to the text from Wiel, the Supreme Court of Idaho, in the case of *Marshall v. Niagara Springs Orchard Co., Ltd.*, 125 Pac. 208, at page 212, says:

> "In the text the author recites the different rules that have been announced by the various decisions, and from such discussion it clearly appears that the weight of authority and better reasoning is with the proposition that an appropriation of water at a point upon private land cannot be made by trespass, and that where an attempt is made to initiate the right to appropriate the public waters of the state by trespass upon private property, such an initiation of such right is void as against the owner of the land."

To the same effect is:

Taylor v. Abbott, 103 Cal. 421; 37 Pac. 408.

In *Tobey v. Bridgewood* (Idaho), 127 Pac. 178, 180, the court had under consideration the question of the right to enter upon private lands for the purpose of initiating the right to appropriate public water. It held that, unless such right of entry was first procured by purchase or agreement with the owner, or secured through condemnation proceedings, after compensation had been made, such entry was void, and that a permit issued by the State Engineer for the right to appropriate such land had no effect.

In the case of *Snyder v. Colorado Gold Dredging Co.*, 181 Fed. 62, the Circuit Court of Appeals for the Eighth Circuit, Mr. Justice Van Devanter, then Circuit Judge, reversed an interlocutory order granting an injunction, and held that, although a patentee of a placer claim over which a ditch existed, took it subject to the easement of the ditch, as it existed at the time of the patent, the owner of the ditch had no right as against the patentee to enlarge the ditch so as to carry an increased volume of water. The court said, at page 70:

> "Thus it was essential that the right to so alter the ditch and to enlarge its use be acquired through a grant from Wells or through a resort to appropriate condemnation proceedings. But as no such right was acquired, the change made in the ditch and its enlarged use were as unlawful and as much a trespass as would have been the construction and use of an entirely new ditch, in the like circumstances. And not only was the increased water appropriation initiated by means of this trespass, but the maintenance and enjoyment of that appropriation are dependent upon a continuance of the trespass. * * * The law not only looks with great disfavor upon claims which are grounded in and sustained by a trespass, but re-

> gards them as of no validity against those whose property is the subject of the trespass, save when by acquiescence or neglect the right to object to it is waived or lost."

See, also,

Larimer County Canal etc. Co. v. Larimer etc. Reservoir Co. (Col.), 143 Pac. 270;

Titcomb v. Kirk, 51 Cal. 288, 294;

Correa v. Freitas, 42 Cal. 339;

Boglino v. Giorgetta (Col.), 78 Pac. 612, 614;

Rasmussen v. Blust et al. (Neb.), 120 N. W. 184;

Mud Creek etc. Co. v. Vivian (Tex.), 11 S. W. 1078;

Vestal v. Young, 147 Cal. 715;

Last Chance W. D. Co. v. Heilbron, 86 Cal. 17, 18.

In the case at bar, it is plainly shown that the appellee did not acquiesce in, or neglect to object to, or waive anything in the premises. On the contrary, it resisted each and every effort of the appellant to invade appellee's rights, and in order to protect its rights was even obliged to tear out some of the flume and logs which had been put in the creek on the Lotta claim on October 3, 1910. As the Court of Appeals of Colorado said, in the case of *Larimer & Weld Irr. Co. v. Landers,* 141 Pac. 517, at page 519:

> "The evidence shows that the flume was torn out several times by defendant, which indicates that it was placed there without license and against the latter's wish and consent."

The water was taken from the Lotta claim by trespass, then by trespass taken over the Parish No. 2 claim,

which at that time was a valid outstanding location; and, under well settled doctrine, under these circumstances, the appellant could not assert or claim any right to the waters of Gold Creek, as against the rights of the appellee.

EIGHTH.

APPELLEE WAS THE FIRST TO COMMENCE WORK LOOKING TOWARD THE APPROPRIATION OF THE WATERS OF GOLD CREEK. EVEN IF APPELLANT COMMENCED WORK FIRST, THE WORK WAS EITHER A TRESPASS AND OF NO AVAIL TO APPELLANT, OR WAS SO REMOTE AND DISTANT FROM THE PLACE OF THE DIVERSION OF THE WATER FROM GOLD CREEK BY APPELLANT, THAT IT CONVEYED NO NOTICE TO APPELLEE.

We have heretofore shown that the Mulligan notice had no legal value; that the posting of it on the Lotta claim, the property of the appellee, was a wilful trespass; and that, therefore, no rights could have been initiated or acquired thereunder. If we have established this fact, appellant cannot apply the doctrine of relation of appropriation of the waters of Gold Creek back to the first of August, 1910. Appellant claims (Brief, page 8):

> "On the same day this notice (the Mulligan notice) was posted (August 1st), Kinzie sent O. M. Harri to Gold Creek to make preliminary arrangements to accommodate a crew of men who were to work on the construction of flumes, tunnel, etc., brush out trails, etc. Lumber was provided for the building of a bunk house for the men. By August 3rd five men were at work, including two Indians, brushing out trails."

It is contended by appellant that the posting of the Mulligan notice *and the asserted commencement of the work thereunder,* were prior in time and prior in right to the appellee.

We will show, first, that appellant did not, before the appellee, commence work looking toward any appropriation of the water of Gold Creek, and second, that, if appellant did commence work before appellee, such work was of no avail, and appellant can claim no right thereunder, and that it does not aid it in the application of the doctrine of relation.

1. Appellant did not commence any work connected with the appropriation of the water of Gold Creek before appellee.

In the consideration of this subject, we respectfully ask the court to have before it defendant's exhibit "S" (Tr. Vol. VI, p. 2167). Appellant claims that it commenced work on August 1, 1910, near the Jualpa dam. This dam is shown on exhibit "S", and is situated on Gold Creek near Cape Horn No. 2. It is claimed that a man by the name of O. M. Harri was sent by Kinzie, the superintendent of appellant, to commence this work on the morning of August 1st. One of the strange things, concerning the commencement of this work by Harri, is that Kinzie states that Harri was never on the ground before he sent him up there on August 1st, and still no one accompanied Harri to give him any information, as to where he should commence work or what he should do (Tr. Vol. I, p. 258).

Kinzie also stated that he sent Harri up there, in the first place, to see if assessment work had been done on the Parish No. 2 claim, which was in the possession, as we have shown, of appellee at that time, but claimed by appellant by virtue of its two Oregon locations, the one made by Corbus in 1899 and the other made by Datson in July, 1910 (Tr. Vol. I, p. 261). This same man Harri testified that he went on what is known as the Oregon claim on August 1, 1910, and was looking around to see if there had been any assessment work done (Tr. Vol. II, p. 391); that he came down from the property on the night of the 1st of August and went to Treadwell (Tr. Vol. II, p. 393).

Kinzie, who had given Harri orders to go on the property above described, to see if the assessment work had been kept up, was then superintendent of appellant and also superintendent of the Treadwell Company, and resided at Treadwell. The only reason for Harri's going to see Kinzie was to report on what he had found out about this assessment work. Harri has an artificial leg (Tr. Vol. I, p. 326); and it would, therefore, seem that he could hardly have succeeded in getting around these mountainous claims and in examining them for assessment work.

Fred Radel testified that he had a conversation with Harri sometime in September or October, 1910, and that Harri stated at that time that Kinzie had sent him up on the appellee's property to look over it to see whether or not the required assessment work had been kept up (Tr. Vol. II, p. 587).

This evidence, we submit, is absolutely inconsistent with the contention of appellant, that it commenced work looking toward the appropriation of the water of Gold Creek on August 1, 1910 (Brief, p. 51).

The question naturally arises how long it took Harri, with his artificial limb, to go over the property and ascertain what assessment work had been done on all of the unpatented claims. The record is silent upon this point.

Wettrick testified that his partner Hill was with him on October 3, 1910, when they went up there to survey and establish the grade for the flume line of appellee, and that they did not see anyone on the old road or trail upon which, appellant claims, it first commenced its work (Tr. Vol. II, p. 644). Mackay also states that he did not see anyone at this place on October 3rd. Of course, this is in the way of negative proof, but we submit, it should have weight, in view of the other testimony which we have cited, given by appellant; besides, it shows that the appellee, on August 3rd, when it went up there to commence work, had no notice of what appellant was doing.

There seems to be but one possible conclusion from the foregoing testimony, and that is, that the appellant did not commence any work looking toward the appropriation of the water of Gold Creek prior to the 3rd day of August, 1910, at which date appellee commenced its work under the Tripp notice; and that, therefore, appellee is prior in time, so far as the commencement of the work relating to the appropriation of the water, is concerned.

2. **No work was done by appellant prior to the latter part of September, 1910, looking toward the diverting of the water from Gold Creek, at the place where it afterwards built its dam.**

Harri testifies that the first thing which he did, when he went on the property, was to ascertain if any assessment work had been done on the Oregon claim, and when he went up on the property on August 3rd, he put some boards in the creek at the place where the Mulligan notice was posted, and did a little sluicing (Tr. Vol. II, pp. 402 and 407).

It is conceded by appellant that its clearing out of brush from the Jualpa dam to where Harri built his cabin was practically over an old trail (Tr. Vol. II, p. 420; see also, Kinzie's testimony, Tr. Vol. I, p. 267).

One of the witnesses testified that where Harri cut brush from the Jualpa dam up to his cabin was along an old and well-beaten wagonroad and path that had been used before (Tr. Vol. II, pp. 461, 462). Harri testified that the distance between his cabin and the Jualpa dam is about 1,000 feet; other witnesses testify that it is more; and the trail that he cleared out between the Jualpa dam and his cabin cannot be seen from where appellant afterwards built its dam (Tr. Vol. II, p. 413).

The witness Wettrick testified that this trail runs from the Jualpa Company's dam to the cabin of Harri as follows: The road, which leads from the Jualpa dam is over the Colorado claim and across appellee's property; anyone could reach Harri's cabin by going on this old road for about one-third of the way from the Jualpa dam; this old road, prior to August 1, 1910, could be

seen upon the ground where it was laid out. The witness said that he had travelled over the road as early as 1908 and in 1910 there was some small brush along the side (Tr. Vol. II, p. 644).

The same witness, Wettrick, testified:

> "Q. Now, I will ask you to apply your rule to this exhibit (Appellee's Exhibit 'S') and just tell what amount of that trail would be on what is marked on this map and plat as the 'Cape Horn' and 'Auk Chief' lode?
>
> A. I should say that there was about 200 feet, I think, of that on the 'Taku Queen' lode and a portion of it on the 'Cape Horn'" (Tr. Vol. II, p. 690).

These two claims, the Taku Queen and the Cape Horn, were the property of appellee. They were never owned by appellant.

This witness further stated that he knew the location of what has been referred to as the "Harri Cabin" or bunkhouse, claimed to be the property of appellant, and he pointed out on appellee's exhibit "S" and located the cabin on the Cape Horn lode at the nearest corner, and it is marked on this exhibit "S" *"Alaska-Juneau Cabin"* (Tr. Vol. II, p. 642).

The witness further testified that he had made a survey in 1910 to ascertain the exact location of Harri's cabin. The witness was handed an exhibit marked defendant's exhibit "C" for identification, and was asked if he knew whose map and plat it was; he stated that it was a copy of a map introduced by the Alaska-Juneau (appellant) at a former trial (meaning Cause 835a, above referred to in this brief). This plat was

offered in evidence and marked defendant's exhibit "B", and was a copy of a map made by appellant for its own use. Witness pointed out on this exhibit Harri's cabin and showed that appellant had located the cabin on the Cape Horn lode claim, the property of the appellee (Tr. Vol. II, p. 643). The building of this cabin was, therefore, also a trespass.

This cabin is frequently referred to by appellant in its brief as a bunkhouse for its employees, to be occupied by them during the grading of the flume line, construction of its flume, and the building of its dam. As a matter of fact, the little cabin was nothing more than a cabin for Harri to occupy, and never was built or intended as a bunkhouse. One James Dempsey (Tr. Vol. II, pp. 464, 466, 467), shows that this little cabin was built by Harri himself and by one Burg in five or six days, and was completed about the 11th or 12th of August. This same witness frequently referred to the building as the "Little Cabin"; he stated that it was about 14x18 feet, was built single-boarded, and that no bunks were placed in it, and that Harri slept on the floor.

This, then, is the bunkhouse, upon which the appellant claims it expended so much money to shelter its employees. The evidence shows that no one, other than Harri, was ever in this cabin or occupied it.

According to Harri, himself (Tr. Vol. II, p. 413), this cabin could not be seen from the place where appellant afterwards built its dam. Kinzie stated in his testimony, that Harri's cabin on a straight line down the creek is about 800 feet from where the dam was con-

structed (Tr. Vol. I, p. 295). It has been shown, by Harri's testimony, that the distance between his cabin, down the creek, and the Jualpa dam is about 1000 feet on a straight line. Following the meanders of the creek, then, *it would be something near a mile from where appellant constructed its dam to the Jualpa dam where appellant says it first commenced work.*

It appears in the evidence, and is conceded by both appellant and appellee, that at about the place where Harri's cabin was built, or a little above it to the right or left, were two pieces of tunnelling work commenced by appellant, one, for the flume of appellant, if the water were taken off the Lotta claim where the Mulligan notice was posted, and the other about 16 feet directly below and under the first tunnel. The appellant later put its flume line through the lower tunnel, tapping the creek by this flume line at the point where appellant afterwards built its dam; that is, the dam which was constructed before the appellant was ejected from the Lotta claim by reason of Judge Cushman's decision.

Wayland, a civil and mining engineer, and a witness on behalf of the appellant, testified that he went up near Snowslide Gulch on the 29th or 30th of August, 1910 (Snowslide Gulch is shown on appellee's exhibit "S"); that nobody was working there except Harri; that he, Wayland, went up the creek as far as the Mulligan notice (Tr. Vol. II, p. 448), and at that time he pointed out to Harri from the Jualpa flume, which is on the opposite side of the creek, where the grade of appellant's flume line should run to divert the water from Gold Creek at the point where the Mulligan notice was posted (Tr.

Vol. II, p. 449). The same witness further stated that he was on the premises at one other time in August of the same year, and that there was no one working on the premises, except Harri. (There was a witness, by the name of Harri, called by appellee, who is to be distinguished from the Harri to whom we have just referred.)

A witness named Lindsey testified that he was in the employ of the appellant, during the summer of 1910, and that he was employed to go upon this property and survey a flume grade, and the first survey was made by him on September 12, 1910. That the grade which he established was about 16 feet above the grade upon which appellant's flume was built; that he did not, on September 12, survey out and establish the grade line of the flume which was afterwards built by appellant between Snowslide Gulch and appellant's dam; that several days, or a week after this, he did survey out the line upon which the flume was afterwards built; that the first survey he made was after the upper tunnel was started, and that any work, which had been done before he made the survey, was done without any survey whatever being made; that, if the flume had been built on the grade of the upper tunnel, it would have tapped Gold Creek just about where the Mulligan notice was posted (Tr. Vol. II, pp. 475, 477, 478).

It thus appears from the foregoing testimony of the witnesses Wayland and Lindsey, two mining engineers and surveyors in the employ of the appellant, that until the 19th or 20th of September, 1910, there never was any survey made of the flume line, upon

which the flume was afterwards built, between appellant's air compressor at Snowslide Gulch and where it built its dam; that, if appellant did any work looking toward the appropriation and the taking of the water from Gold Creek prior to that time, it was done upon a grade to take the water from Gold Creek where the Mulligan notice was posted on the Lotta patented claim. *But this was work in furtherance of the wilful trespass, initiated by the posting of the Mulligan notice on the patented property of appellee; and, we submit, appellant can claim no rights thereunder.*

As a matter of fact, the evidence shows that all of the work done by appellant was a continuing trespass, whether it was done upon the first contemplated flume line or upon the second one, for the reason that a flume, built over the grade of either line, would have taken the water from Gold Creek on the Lotta patented claim of appellee.

It was determined by Judge Cushman, in his decision, that the water was taken from Gold Creek from the Lotta claim, by means of a dam built thereon by appellant and sheered into the flume, which appellant built upon the lower grade, or along the line surveyed out the 19th or 20th of September, 1910.

3. No open or physical demonstration of an intent to appropriate the water was made by appellant prior to October 3, 1910.

Leaving out the question of rules, regulations, customs and statutes prescribing how water may be appropriated, in determining the time when the right to water

by appropriation commences, we find numerous authorities which hold, that:

> "In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but by applying the doctrine of relation fixes it as of the time when he *begins his dam or ditch or flume or other appliance,* by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence."
>
> *Union Mill & Mining Company v. Dangberg,* 81 Fed. 73.

See, also:

> *Black, Water Rights,* Section 55;
>
> *Mining Company v. Carpenter,* 4 Nev. 534, 544;
>
> *Kimball v. Gearhart,* 12 Cal. 28;
>
> *Osgood v. Mining Company,* 56 Cal. 571.

In the case of *Hough v. Porter,* (Ore.) 95 Pac. 732; 98 Pac. 1083, the court uses the following language:

> "To constitute an appropriation for mining, irrigation or other power purpose, *a diversion thereof, or other good notice is necessary."*

In *Farnham on Waters,* Vol. II, p. 2055, Section 662, it is stated:

> "To constitute an appropriation of water sufficient to vest a right therein under the Wyoming Irrigation Laws there must exist not only an intent to take the water, but that intent must be accompanied or followed by some *open, physical demonstration."*

The commencement of active operations, unless such operations are such as *to impart notice to the other*

claimant, is of no value. The decisions dealing with this phase of the case always refer to the building of a *dam, flume, or laying of a pipe line, or digging of ditch, etc.,* which, of course, is a physical demonstration, which would impart notice to the rival claimant to the water. The same doctrine applies when there are rules, regulations or statutes governing the appropriation of water, and neither of the rival claimants follow the statutes, rules and regulations. In such a case, the better right would, by relation, be in him, who began first *in a way that gave notice from his acts;* provided he prosecuted the work with diligence.

Wiel on Waters, 3rd Ed., p. 405;
60 Am. St. Rep. 801;
Naeris v. Briknell, 68 Am. Dec. 257;
Kimball v. Gearhart, 12 Cal. 27.

The trial court in Finding V (Tr. Vol. VII, p. 2654), declares:

> "That not until after the defendant (appellee) had followed up its first step, namely, posting of notice, by actual physical work at the point where its notice was posted, and after actual diversion of water at such point, did the plaintiff (appellant) do anything that would give notice to the defendant (appellee) of any claim that the plaintiff (appellant) intended to make to the water of Gold Creek, or to do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek."

The court undoubtedly had in mind, in making this finding, that the first open, physical demonstration of any character, made by appellant looking towards the appropriation and use of the water of Gold Creek and

which was calculated to give notice to appellee, was on October 3, 1910, when the appellant undertook to commit a trespass and to put in a dam on the Lotta claim and had employees of the appellee arrested.

4. The work of appellee gave prior notice.

The first *open, physical demonstration* made by appellee was about the middle of September, 1910, at which time the appellee had cut away an opening in its dam and excavated a ditch just below the opening, put in a headgate in the opening of the dam and allowed the water to flow through the same into the ditch (see testimony of John Carlson, Tr. Vol. II, pp. 742, 743; testimony of Al. Black, Tr. Vol. III, pp. 803, 804).

5. Appellant's asserted rights are predicated entirely upon its attempt to appropriate water on private land.

Appellant states (Brief, p. 46):

> "If we are to assume that there was no local rule or custom on the subject, then the one who first commences the work secures the prior right, and in this case it was the Alaska-Juneau";

and then it cites the case of *Van Dyke v. Midnight Sun M. & D. Co.*, 177 Fed. 85, 92, from which the following is quoted:

> "Inasmuch as the Statutes of Alaska make no provisions respecting the necessity of either the posting or recording of notices of appropriation of water *upon the public land,* we think no such notice essential to the validity of a *bona fide* diversion of such waters for a beneficial use in Alaska."

The above doctrine is not applicable here, because, in that case, no custom was shown. Moreover, the citation

of this case, which deals solely with appropriation on *public lands,* indicates a failure to recognize the distinction between the appropriation of water on public lands and the right to appropriate water on lands held in private ownership. We have shown, we think, that the taking or appropriating of water on public lands has nothing to do with the position of appellant, which is entirely founded upon its attempt to appropriate water on appellee's property.

Ninth.

THE RIGHTS OF APPELLEE MAY BE SUSTAINED UNDER THE NOTICE POSTED BY JOHN R. WINN ON BEHALF OF AND FOR APPELLEE ON AUGUST 17, 1910.

Appellant, in its brief, simply mentions the notice posted for appellee by John R. Winn on August 17, 1910, and says that it will discuss it somewhere later on (Brief, p. 13), but this it failed to do. We are, therefore, not apprised of the position which appellant takes with reference thereto.

It cannot be claimed that this notice was not posted for appellee, because it appears on the face of the notice itself that it was so posted. It is our contention that, even if the Tripp notice were ineffectual and even if appellee acquired no rights thereunder, nevertheless, the work done and performed on appellee's property, looking toward the appropriation and use of the water of Gold Creek, would date back, by the doctrine of relation at least to the posting of the notice by Winn.

The Winn notice was posted by John R. Winn, as agent and attorney for appellee, on the 17th day of August, 1910. It was posted on the old Ebner dam at the intake of the new flume, on the opposite side from the Tripp notice. The notice was as follows (Tr. Vol. VI, p. 2218):

"Notice of Water Location.

"Notice is hereby given that the Ebner Gold Mining Company, a corporation, are the owners and claim under this Notice all the waters of this creek, Gold Creek, to its entire flow during all seasons and at all time or times, that said corporation is not already entitled to by reason of prior right or prior location or appropriation, or prior right to use or appropriate; that is all the water of said creek, if any, in excess of what said corporation is not now entitled to by reason of prior location, use or appropriation or riparian ownership, to be conveyed by ditch, flume, or pipe or in any other practical or convenient way from said creek and creek bed and to be used in the working, mining, and developing of the mines owned by said Ebner Gold Mining Company, and in milling, treating and reducing the ores taken from said mines of said corporation and for other beneficial and useful purposes.

"Said Ebner Gold Mining Company does not intend by this notice to waive any right that it may have to the use of the waters of said creek by reason of its flowing over the mines and mining claims now owned or possessed by it, and does not waive any right of riparian ownership of said water or riparian use of said water flowing over the mines and property owned or possessed by it; nor does not waive any right to the use or any or all of said waters by reason of its or its predecessors in interest prior location, appropriation or use of said water.

"This notice is posted on the Ebner Dam on the Crown Point Lode Claim (patented) U. S. Survey No. 90, and owned by the Ebner Gold Mining Company, the locator herein.

"Date of this Notice of Location August 17, 1910.

"Posted on the 17th day of August, 1910.

EBNER GOLD MINING CO.,
By Jno. R. Winn,
Its Agent and Attorney.

Witnesses:
Newark L. Burton.
William Walker."

The notice was, on the 17th day of August, 1910, recorded in the office of the recorder for the Juneau Recording District, at Juneau. In reference to the posting of this notice, Mr. Winn testified as follows:

"Q. I hand you a picture and ask you if there is anything on there that you particularly recognize?

"A. This is Defendant's Exhibit 'F-1' (which is found in Vol. VI, at p. 2229); it is the photograph that was identified by Mr. Wettrick this morning, and I identify the post or board near the intake of the new Ebner flume, and also the cross board that is on it, as being the place at which I posted up a certain location notice that I made for the Ebner Gold Mining Company, which has been offered in evidence in this case; I also may state in that connection that Al. Black came over at the time I put up this notice, and Mr. Black had been at work up there for some days and had the approach for the right of way of the flume cleared away for quite a little distance from the intake of the flume at the Ebner dam (meaning the intake of the new flume). Black came over and he was there at the time the notice was posted, and I walked over and saw what work he had been doing. Mr. Hill and Mr. Wettrick went up there

with me to post the notice'' (Tr. Vol. IV, pp. 1218-19).

The copy of the photograph, referred to as being on page 2229 of Volume VI of the record, is very dim and the objects thereon cannot be very well seen without a magnifying glass, and we, therefore, respectfully ask the court to examine the original photograph on file, as it is much plainer and all of the objects on it can be easily seen and distinguished.

We have heretofore shown the work done by appellee, looking toward the appropriation of the water of Gold Creek, the time of the commencement of it, and the progress of the same.

We have likewise shown that not until September 19 and 20, 1910, did appellant survey out the flume line upon which it constructed its flume; that the first survey which was made by appellant of any flume line was on the 12th day of September, 1910, and that any work which was done by appellant, prior to that time, leaving out that accomplished by the trespass, was in such a desultory manner and so far distant from where appellant afterwards took the water from Gold Creek, that it could not have imparted notice to appellee of appellant's intention.

TENTH.

THE JUDGMENT WILL NOT BE REVERSED UPON THE GROUND THAT THE DECREE AWARDS TOO MUCH WATER TO APPELLEE.

Appellant states (Brief, p. 70), that

''the court finds that the capacity of the new Ebner flume is 3200 inches, and yet the decree awards

> 10,000 inches, the amount named in the Tripp notice''.

Even if the finding by the lower court did not justify its award, the appellate court would, we submit, not reverse but would simply modify the decree, giving the appellee 3200 inches. For, as said by the author in 3 Cyc., page 427:

> ''On appeals in equity cases, where the court can see from the record what the rights of the parties are, it will not remand the case, but will render such decree as ought to have been rendered below.''

As said by the court in *Harrison v. Clarke,* 182 Fed. at page 767:

> ''It is well settled practice in the Federal Court of Appeals, in reviewing equity causes, to dispose of them finally on the record before the Appellate Court and not remand them for further trial in the Circuit Court.''

See, also:

> *Mason City & Ft. Dodge R. Co. v. Boynton,* (C. C. A. 8th Cir.) 158 Fed. 599.

For a case very similar as to its facts, and holding that the upper court will merely modify the decree of the lower court to make it conform to its findings, when the findings and the decree conflict, see:

> *Animas Consolidated Ditch Co. v. Smallwood,* (Colo.) 125 Pac. 594.

CONCLUSION.

We earnestly and respectfully submit that it is manifest from the record in this case that the court below

was entirely right in its conclusion that the appellant has established no rights whatever to the waters of Gold Creek; and that, if this court should determine that appellant has any such rights, then, that they are subject to the prior rights of appellee; and that, in either event, the decree should, therefore, be affirmed.

Dated, San Francisco,
December 16, 1916.

Respectfully submitted,

JOHN R. WINN,
ALFRED SUTRO,
Attorneys for Appellee,
Ebner Gold Mining Company.

WINN & BURTON,
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A. D. PLAW,
Of Counsel.

APPENDIX.

THE FINDINGS.

I.

That the defendant, the Ebner Gold Mining Company, was, prior to the filing of the complaint of plaintiff herein, and at the time of the trial of said cause, and now is, a corporation, duly organized and existing under the laws of the Territory of Alaska, and as such has complied with all of the rules respecting corporations doing business in the Territory of Alaska, and has paid its license fees as provided for by Chapter II of the Session Laws of 1913 of the Territory of Alaska, and is authorized to sue and maintain suits, actions and proceedings in said Territory of Alaska, and that the remaining defendants are merely nominal and not necessary defendants.

II.

That the said Ebner Gold Mining Company is the principal defendant in this case, the other defendants are not necessary parties to the action, but are made defendants by reason of the facts alleged in the complaint, and they are in no wise connected with the ownership of the property hereinafter referred to, or in any wise connected with the water right in question so as to affect the determination of this case. The Ebner Gold Mining Company was for a long time prior to the commencement of this action, and was at the trial of the same, the owner of a large number

of contiguous quartz mining claims and mill sites in Silver Bow Basin near Juneau, Alaska. That these mining claims carry and contain gold in great value in the form of a low grade milling ore. That the upper end lode claims lie high up in the mountains and the mill sites in the valley below; that Gold Creek flows over and across the said group of lode claims commencing at the upper end thereof, then, in its course, winds its way down to the mill sites of said company; the said creek is a mountain stream with considerable fall and rapids, and at certain seasons of the year carries quite a large volume of water, and, at other seasons the flow of water is somewhat small by reason of cold weather. That for 15 or 20 years prior to the commencement of this action by the plaintiff, the Ebner Gold Mining Company had been mining and milling the ores taken from some of their claims at the upper end of the group and for said purpose constructed, operated and maintained part of the time a 10-stamp quartz mill and part of the time a 15-stamp quartz mill located at the upper end of the group of claims, and in connection with the quartz mill constructed and maintained ore bunkers, air-compressor and all buildings, equipment and machinery necessary for successfully operating said mill, mining and milling and treating the ores taken from said upper end lode claims. That for the purpose of power in the mining and milling of said ore, the said company diverted and appropriated and used from Gold Creek water, all the water that was necessary for the purposes above referred to. This

diversion of water from Gold Creek was also made at the upper end of the group of claims and taken off of the property of the defendant company, used for the purpose above mentioned, and returned to Gold Creek.

III.

That some time about 1908, and a long time prior to the commencement of this action, the Ebner Gold Mining Company and its general manager and president, William M. Ebner, concluded to open up the said mining property and mine, mill and treat the ores taken therefrom upon a larger scale than it had theretofore been operating said mines, and to that end and purpose it was concluded to drive a large working tunnel, commencing said tunnel at the lower end of the property upon what is known as Cape Horn No. 2 lode claim belonging to said company, thence driving said tunnel through said group of claims to the upper end of the same to the old workings, which said tunnel would crosscut the formation and show up the values of the property, as well as to serve as a working tunnel. They also concluded upon building and constructing and equipping a large stamp mill of about 150 or 200 stamps at or near the portal of said crosscut and working tunnel and to build and construct a flume and pipeline to take from Gold Creek a large quantity of water and convey it from a point at or near where the water had been diverted from the creek in connection with the said 15-stamp mill, which is at the upper end of the group of claims, to a point near the portal of the tunnel and at the

place where it was decided to erect the 150 or 200 stamp mill, and to erect such other buildings and install such other machinery so as to carry out the plans decided upon.

That during the year of 1909 one H. T. Tripp, an experienced mining engineer, was employed by persons interested in said group of mining claims of the Ebner Gold Mining Company to look over, examine and explore said mining property and to report on the advisability of opening up and mining said property on a larger scale, as had been decided on by the said William M. Ebner, and the said Ebner Gold Mining Company. That said Tripp made a thorough examination of the property, its formation, the ore body or bodies, and the water of Gold Creek flowing therethrough, and reported favorably on what the said Ebner and Ebner Gold Mining Company had concluded to do. That Tripp completed his work and made his report about the last of June or the first of July, 1910.

IV.

The court further finds that as early as October, 1880, the miners in and near the vicinity of Juneau and Silver Bow Basin, including the territory covered by the Ebner Company's group of mining claims, diverted and appropriated water from streams to be used for mining and other beneficial purposes and ever since about that date it has been the universal practice and general custom for any person or corporation desiring to appropriate water for the purposes last above mentioned to post a notice in writing in a

conspicuous place at the intended point of diversion on the creek or stream from which the water is expected to be diverted or taken; that the posting of such notice has always been considered under such general custom of miners as the first step taken looking towards the appropriation and applying the water to mining or some other beneficial use as well as showing the intention of the person or corporation posting the notice and giving warning and notice to others of the poster's intention of utilizing such water.

And the court further finds that the posting of the notice in the manner above mentioned does serve the purpose above stated. That the said H. T. Tripp knew of the above mentioned custom, and while examining and exploring the group of mining claims of the said Ebner Gold Mining Company as stated in these findings, on the 29th day of June, 1910, attached to a board and posted in a conspicuous place on the Ebner Gold Mining Company's dam, which had been constructed for the purpose of diverting the water and conducting it to the 15-stamp mill, a written notice claiming 10,000 miners' inches of water of the said Gold Creek, which said notice is as follows:

"Notice of Water.

Notice is hereby given to all whom it may concern that I the undersigned claim 10 thousand miners' inches of water flowing in this creek or any part of 10 thousand miners' inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek with pipe or flume or both to any place on the property known

as the Ebner Mine or to carry across or farther than the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner dam about 1¾ miles up from Juneau, Alaska, on Gold Creek.

Dated this 20th day of June, 1910.

Time—7:30 A. M.

Locator—H. T. Tripp.

Witness: John Soini."

That said notice could be plainly seen from a public highway which runs up Gold Creek and in close proximity to said dam on which said notice was posted. That while said H. T. Tripp signed or affixed his own name to the notice, the said making out of said notice and posting of the same, and said step so taken looking towards the applying of said amount of water to use for mining or other beneficial purposes, was done by the said Tripp on behalf of and for the said group of mining claims of the Ebner Gold Mining Company and parties interested therein, and said water was intended to be conducted down over and across the said group of mining claims from the point of intake of the said defendant company to the mill site and tunnel portal on the Cape Horn No. 2 claim at the lower end of the Ebner property and there to be used and applied to the air-compressor and the new mill to be built, and for mining purposes generally, as had been contemplated under the Ebner and Tripp scheme of opening up, mining and operating said property on a larger scale as has been referred to in these findings.

V.

The court further finds that the action of said Tripp in posting of said notice mentioned in the finding above set forth was the first step taken by anyone looking towards the future diversion and appropriation of the water of Gold Creek, and said action of said Tripp was prior to any step taken by plaintiff, or any intention made manifest by plaintiff, of taking any water from Gold Creek and applying it to mining or other beneficial use, and was prior to the posting of any water location notice by said plaintiff.

That not until after the defendant had followed up its first step, namely, posting of notice, by the actual physical work at the point where its notice was posted and after actual diversion of the water at such point, did the plaintiff do anything that would give notice to the defendant of any claim that the plaintiff intended to make to the water of Gold Creek, or do anything looking to the appropriation of water, or indicating any intention or desire to appropriate the waters of Gold Creek.

(There is no Finding VI.)

VII.

That by certain mesne conveyances said H. T. Tripp a long time before the commencement of this action assigned or conveyed whatever right or title he acquired by reason of posting the notice signed by him, to the defendant, Ebner Gold Mining Company.

That work was commenced under said Tripp notice and those for whom said water was located and their

successors in interest have proceeded with due diligence with their work in the opening up and developing of said mining property and the application of the water of Gold Creek under said notice to actual use. The tunnel mentioned in these findings which had been decided upon to be driven by said Tripp and Ebner was soon after the filing of said notice surveyed out, commencing at the lower end of the said group of claims on Cape Horn No. 2 lode claim, and extending to the upper end of said group of claims to what is known as the old Ebner workings, about the point of the 15-stamp mill, and had been driven at the time of the commencement of this action 2600 feet and taps the ore bodies of said group of claims at various depths, being from the bottom of said tunnel to the surface about.....feet. That a right of way was surveyed out for a high line flume which had been decided upon by said Ebner and Tripp, said survey commencing at the point where the Tripp location notice was posted and extending around the hillside across the Ebner property to a point near the portal of the tunnel and the mill site, which said flume is 3¾ feet by 4 feet and about 4000 feet long, and has a carrying capacity of approximately 3200 miner's inches of water, and had been completed at the time of the commencement of this action. Lumber and material were purchased for a 200-stamp mill, and most of the machinery bought to equip said mill, the mill site graded at or near the portal of said tunnel, and at or near the point where the water was to be conveyed. That on the 14th day of September, 1910, water was diverted from Gold Creek at a point where the Tripp notice

was posted, said water run through a large open cut made for the purpose of laying the new flume, and this diversion of the water from Gold Creek was prior to any diversion therefrom made by the plaintiff herein. The new flume line above referred to was completed from a point on Gold Creek where the Tripp notice was posted to the penstock of said company on the 15th day of December, 1910. Work was commenced on the tunnel above referred to on or about the..... day of....., 1910, and was diligently and actively kept up, said tunnel being 8 feet by 8 feet, and as above stated had been driven 2600 feet at the time of the commencement of this action, and at the time of filing the answer in this cause there had been over 4000 feet of tunnelling, cross cuts and drifts completed. That before the commencement of this action a large new air-compressor plant had been erected near the mouth of the tunnel and a pipe-line leading from the penstock above mentioned to the air-compressor, and in August, 1913, said pipe-line was connected up with said air-compressor and the water used for power in running the same, and said air-compressor was used in continuing the driving of the new tunnel referred to in these findings and has been applied to that use ever since said last mentioned date. Prior to the commencement of this action the lumber and material referred to herein for the building of the 200-stamp mill as well as the machinery for the equipment of the said mill had been purchased and forwarded to Juneau, Alaska, and most of the same on the mill site near the place of the erection of the new mill. That since the commencement of this action and at

the time of the trial of the same, work has progressed on said property with due diligence and from time to time larger quantities of water taken from Gold Creek through the said new flume and applied to use by the defendant company as necessity demanded.

VIII.

The court further finds that at the time the plaintiff in this case claims that the defendants were wrongfully depriving said plaintiff of the use of the water of Gold Creek, the defendants were using the same, and it was necessary for the defendants to have the same to progress with their said work. That it has been necessary at all times for defendant to have the use of said water.

IX.

That the tunnel being driven by the defendant, the Ebner Gold Mining Company, referred to in these findings, is being driven through the group of Ebner lode mining claims, known as the Ebner mine, being the group of lode mining claims for the benefit of which said water was located by said Tripp, as aforesaid, and all of the work in connection with the development and opening up of the ore bodies in said group of claims since the location of said water by said Tripp has been done with diligence, and $351,000.00, more or less, expended in opening up such ore bodies in said Ebner group of lode mining claims, and the work was at the time of the trial still progressing with diligence. That all of said work was being done for the purpose of opening up the Ebner group of lode

mining claims as a mine so that the bodies of ore within the exterior boundary lines of said group of claims could be opened up and mined, and the ores milled and treated, and the precious metals extracted therefrom.

X.

With reference to the rules and regulations which plaintiff sets out in its reply and claims were adopted by the miners of Harris Mining District in 1882, covering and governing the appropriation and diversion of water from streams for mining and other beneficial uses, the court finds, after careful consideration of the evidence and the law relating to such rules and regulations, that they never were followed by the miners and were never put in force, or, if they ever were followed or put in force, they fell into disuse and became obsolete before the rights of either of the parties to this action were claimed to be initiated, and that they are inconsistent with the general laws of the United States and could not be in force since the extension of organized government to Alaska in the year 1884, and are therefore of no effect in the determination of the issues in this case.

XI.

The court further finds that the work of diversion, appropriation and application of the water from Gold Creek by the defendants herein was prosecuted to completion with reasonable diligence from the time of the inception of said right.

And from the foregoing findings, the court drew the following

CONCLUSIONS OF LAW.

I.

That as against the plaintiff, the defendant is the owner of and entitled to the first use of 10,000 miners' inches of water, to be taken from Gold Creek at or in the vicinity of the place where the Tripp notice was posted.

II.

That whatever rights plaintiff has in the water of Gold Creek by reason of anything set forth in its complaint, is subsequent, inferior and subordinate to the rights of the defendant, as set forth in these findings.

III.

That the plaintiff is not entitled to the relief asked for or to any relief.